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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

High Court of Chancery.

COLLECTED

BY JOHN DICKENS, ESQ.

THE LATE SENIOR REGISTER OF THAT COURT.

REVISED

BY JOHN WYATT,

OF THE INNER TEMPLE, ESQ. BARRISTER AT LAW.

IN TWO VOLUMES.

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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

Gaſcoine v. *Douglas.*

26 May 1770.

SALE of a plantation at St. *Chriſtopher's* decreed for ſatisfaction of money charged on it.

Kaye v. *Banks.*

June 1770.

INJUNCTION granted to ſtay cutting down ſapplins, wavers, and fruit trees.

Tothil v. *Pitt.*

11, 12 May and 23 June 1770. 6 Bro. P. C. 450. S. C.

ROBERT *Tothil* Eſq. was poſſeſſed of 4000*l.* Bank ſtock, ſix Exchequer orders, and four leaſehold houſes.

He by will, after deviſing his real eſtates, gave the Bank ſtock, Exchequer orders, and leaſehold houſes, to Sir *William Pinſent* for life; and after his death to pay the intereſt to *Leonora Pinſent* during her life, and after her death to the heirs male of her body lawfully begotten for ever; and for want of ſuch iſſue, to the plaintiff, and if the plaintiff married and had iſſue, to his heirs male for ever; and for want of ſuch iſſue, he gave the ſame to *I. S.*

Whether a limitation in a will was a perpetuity.

And his diamond ring, gold repeating watch, plate, and books, the teſtator directed ſhould be kept ſafe,

Tothil v. *Pitt.*

until it was apparent who, by virtue of his will, would have a right to enjoy his eſtate.

Afterwards Sir *William Pinſent* died, and by his will deviſed all his eſtates to the defendant the Earl of *Chatham.*

And under this will the defendant claimed and poſſeſſed, amongſt other things, the Bank Stock, Exchequer orders, leaſehold houſes, and diamond ring, watch, plate, &c.

The plaintiff filed his bill to have the ſaid Bank Stock, Exchequer orders, and leaſehold houſes tranſferred and aſſigned to him.

The queſtion in the cauſe was, whether the limitation in the will was not, in effect, a perpetuity.

The cauſe was heard before Sir *Thomas Sewel* M. R., and the bill diſmiſſed.

It came on before the Lords Commiſſioners *Smith*, *Aſton*, and *Bathurſt*, upon an appeal, and ſtood this day for judgment.

Lord Chief Baron *Smith*, after ſtating that part of the will on which the queſtion aroſe, proceeded thus:

The rule for the conſtruction of wills is, that they ſhall take place, if agreeable to the rules of law.

A limitation that will create a perpetuity is void; therefore perſonalty cannot be bound.

The queſtions are, what was the intent of the teſtator; and whether his intention will create a perpetuity; whatever may be his intention, no operation of law will give an eſtate tail in the premiſes: In *Webb* v. *Webb*(*a*); and *Villers* v. *Villers* (*b*), it was ſo determined.

(*a*) 2 Vern. 668. 1 P. Wms. 132.
(*b*) 2 Eq. Ca. Abr. 305.

If this caſe doth not differ, I ſhall think myſelf bound by thoſe determinations.

It is plain the teſtator meant to give Miſs *Leonora Pinſent* only an eſtate for life; it is plain that heirs of

of the body are words of purchaſe; and therefore I am of opinion, the order of diſmiſſion was wrong.

Lord *Bathurſt* C. ſaid further, that heirs male of the body, muſt be conſidered as children.

Therefore the order of diſmiſſion was reverſed, and the Bank Stock and Exchequer orders, were directed to be transferred to the Accountant General, and the intereſt paid to the plaintiff for life.

And the money produced by the ſale of the leaſehold houſes, to be paid into the Bank, and laid out in Bank annuities, and the intereſt paid to the plaintiff for life.

And the Maſter was to enquire into the value of the large diamond ring, gold watch, &c. directed by the will of the teſtator, *Robert Tothil*, to be kept ſafe, until it was apparent, who, by virtue of his will, would have a right to enjoy his eſtate, and to compute intereſt, on what he ſhould find to be the value thereof; which value and intereſt were to be paid into the Bank, and laid out for the benefit of the perſon, to whom they ſhould thereafter belong.

The caſes cited on the part of the plaintiffs, were *Leacock* v. *Spooner*; *Ward* v. *Bradley*, 2 *Vern.* 23; *Smith* v. *Cleaver*, 2 *Vern.* 38, 59; *Fonnereau* v. *Cleaver*, *Eaſter Term* 1754; *Wachel* v. *Wachel*, 1 *Chan. Caſes*, 130; *Ward* v. *Saunders*, *Forreſter's Reports*, 135; *Jones* v. *Weſtcombe*, 1 *Eq. Ca. Ab.* 245; *Stanley* v. *Lee*, *Michaelmas Term* 1732; 2 *P. Wms.* 686; *Saberton* v. *Saberton*, *Forreſter's Reports*, 235, and 2 *Stra.* 1072, *Michaelmas* 1736; *Gower* v. *Groveſnor*, 2 *Eq. Ca. Ab.* 327.

The caſes cited on the part of the defendant, were *Backhouſe* v. *Bellingham*, *Poll.* 33, 16 *Chas.* II.;

Tothill v. Pitt.

Burgeſs v. *Burgeſs*, 1 *Mod.* 114; *Higgins* v. *Dowler*, 1 *P. Wms.* 98; *Hordell* v. *Buſy*; Duke of *Newcaſtle* v. *Pelham*; *Bullock* v. *Knight*, 1 *Chancery Caſes*, 265; *Theebridge* v. *Kilburne*, 1750; 2 *Veſ.* 233.

Trin. 1770.

Peacock v. *Mac Kericher*

UPON hearing the cauſe, an iſſue was directed: the defendant having made default, a doubt aroſe as it was not a ſolemn judgment, but only an interlocutory order to ſatisfy the conſcience of the Court, whether the defendant ſhould have a day to ſhew cauſe againſt it; by the direction of the Lords Commiſſioners *Smith*, *Aſton*, and *Bathurſt*, I attended Sir *Thomas Sewel* M. R. for his opinion; he was clear the order ſhould be *niſi*.

Upon making this opinion known to the Lords Commiſſioners, they perfectly coincided with his Honour, and directed the order to be *niſi* (*a*).

(*a*) Harman v. Spottiſwood, 28 June 1773, S. P.

12 & 23 Nov. 1770. Lords Commiſſioners Smith, Bathurſt, and Aſton. Ambl. 692. S.C.

Salway v. *Salway*.

THE plaintiff, the widow of Mr. *Salway*, her ſecond huſband, brought her bill to have an account taken of the arrears of a rent charge, due at *Michaelmas* 1757, at the time of the death of her firſt huſband Mr. *Cartwright*; and alſo to be paid the ſum of 153*l.* 3*s.* due on a judgment recovered by her late father, of whom ſhe was the ſurviving executrix.

On a queſtion whether arrears of a rent charge incurred in the life-time of the plaintiff's late huſband, and money due on a judgment recovered by her late father, of whom ſhe was ſurviving executrix, belonged to the plaintiff, or to the repreſentatives of her late huſband; held they belonged to the plaintiff, as his widow.

The

The queſtion in the cauſe was, whether the rent charge due at the death of the ſaid Mr. *Cartwright*, was a ſurviving debt to the wife; or a right veſted in Mr. *Salway* her ſecond huſband, and belonged to his repreſentatives.

On the part of the plaintiff it was contended, that it was an intereſt which ſurvived to the wife; and that the huſband was not a purchaſer.

On the part of the defendants, it was inſiſted, that *Salway* the huſband, by the ſettlement he made on his wife, became purchaſer of every intereſt ſhe was entitled to.

The following caſes were cited, *Rudyard* v. *Nearn*, 2 *Vern.* 503, *Prec. Chan.* 209; *Burnett* v. *Kinnaſton*, 2 *Vern.* 401; *Meredith* v. *Wynne*, 2 *Eq. Ca. Abr.* 352; Lord *Carteret* v. *Paſchall*, 3 *P. Wms.* 197; *Adams* v. *Cole*, 2 *Eq. Ca. Abr.* 143.

Lord Commiſſioner *Smith*.—The bill is brought by the plaintiff, as the widow of *Cartwright* her firſt huſband.

Two queſtions have ariſen: Firſt, whether this is not ſuch an intereſt as ſurvived to the ſecond huſband: Secondly, if the plaintiff's ſecond huſband is not to be conſidered as a purchaſer.

That it is a *choſe in action*, there can be no doubt; Mr. *Salway* might have received the arrears, if he had thought fit; he did not receive them, and it was his own neglect. In whoſe name muſt any legal ſtep have been taken to recover them? Not in his name; it muſt have been in the names of the truſtees.

The arrears of the rent charge, are therefore certainly a *choſe in action*, and not having been reduced

Salway v. *Salway.*

into poſſeſſion, conſequently belong to the plaintiff: and I am equally clear in my opinion, ſhe is entitled to receive the arrears, the money received ſince, and alſo the money due on the judgment.

Therefore declare the plaintiff is entitled to the ſum of 1058 *l.*; the arrears of her rent charge of 300 *l.* a year accrued in the life-time of *Thomas Salway*, her late huſband, and the arrears incurred ſince his death, in reſpect of the ſaid rent charge; and that the plaintiff is likewiſe entitled as ſurviving executrix of her late father, to the ſum of 150 *l.* and 63 *s.* coſts, mentioned in the judgment obtained by the late father againſt *I. S.*; and let an account be taken thereof; and let what ſhall be found due, be paid to her accordingly.

---

10 Nov. 1770. Lords Commiſſioners.

Combe v. *Acland.*

THE queſtion in this cauſe was upon accumulated intereſt, from the confirmation of the report, *Bacon* v. *Clarke*, 1 *P. Wms.* 478; *Brompton* v. *Alkis*, 2 *Vern.* 566; *Mills* v. *Banks*, 3 *P. Wms.* 1. were cited.

But the Court would not break through the rule.

Smith

Smith v. Earl of *Pomfret*.

23 Nov. 1770.

To make an order in the nature of a decree, on an interlocutory application, it muſt be made by *conſent*.

THE bill in this cauſe was for an injunction to ſtay the defendants from proceeding at law.

Upon ſhewing cauſe for continuance of the injunction before Lord *Camden* C.

His Lordſhip *without conſent* directed an action of trover to be brought in order to try the right: if it were not brought, the injunction was to continue. It was brought, and a verdict was found in favour of the plaintiff.

The defendant applied this day for a new trial, having ſuffered the time to elapſe, within which, by the rules of a Court of law, he had to apply there for a new trial: The following caſes were cited, *Edwin* v. *Thomas*, 2 *Vern.* 75 (*a*): *Lomax* v. *Ryder* (*b*), an appeal to the Lords in 1721, becauſe the Court of Chancery had refuſed to grant a new trial, where it affected the inheritance, which the appellant inſiſted that the ſaid Court was bound to do.

(*a*) 1 Eq. Ca. Abr. 378. S. C.

(*b*) 2 Bro. P. C. 258.

I took the liberty, being ſent for by the Lords Commiſſioners *Smith*, *Bathurſt*, and *Aſton*, to ſuggeſt that there was a difference between an iſſue directed by the Court, and where a party is left at liberty to bring an action to aſcertain his right.

The firſt is in order to ſatisfy the conſcience of the Court:

The latter to aſcertain the party's right to come here.

The Court having directed the trial in the firſt inſtance for it's own ſatisfaction, it is neceſſary to

Smith v. Earl of *Pomfret.*

know if the Court is ſatisfied with the verdict found upon it; and for that reaſon it is, that an application is made to this Court for a new trial: in the laſt inſtance, this Court hath nothing to do with the trial, or the verdict; the verdict is the authority for this Court to go by; if it be wrong, the party aggrieved, ſhould have applied to the Court at law for a new trial; the defendant in this caſe, hath not done ſo; and therefore he hath no buſineſs here.

The Lords Commiſſioners on this ſuggeſtion, all ſeemed ſatisfied, that they had nothing to do with it: however they heard the point argued, and *refuſed a new trial.*

From this judgment Lord *Pomfret* appealed; and upon the argument in the Houſe of Lords, Lord *Mansfield* took this diſtinction; that where the Court makes an order *by conſent* of the parties in an early ſtage of the cauſe; it operates as if regularly brought to hearing; but that it is otherwiſe if the order be made without conſent; that this was the caſe here, and therefore Lord *Pomfret* was not bound. He afterwards came back to this Court, and *by conſent*, an iſſue was directed to be tried at the bar of the Court of King's Bench.

But query if his going to trial on that order, was not an aſſent to, and a confirmation of it; however this was the reſult. J. D.

Cator v. *Butler.*

1 Feb. 1771. French v. Bacon, ſupr. S. P.

BILL to have the truſts of a will executed by ſale of the real eſtate; the heir at law was abroad; and had been ſo for ſo long a time, as not to come within the Statute of the 5th *Geo.* 2. "to render proceſs effectual againſt perſons who abſcond, &c."

Lord

Lord *Bathurſt* C. firſt taking notice, that the will was duly executed, though he did not eſtabliſh the will, directed the real eſtate to be ſold, in aid of the perſonal eſtate.

Cator v. *Butler.*

Braithwaite v. Robinſon, 16 June 1734, was a ſimilar caſe.

Freeman v. *Carnock.*

5 March 1771.

Service of a ſubpœna on an infant perſonally, not good.

IT was held that ſervice of a ſubpœna to hear judgment, perſonally on an infant, is not good ſervice. It is neceſſary to ſerve his guardian *ad litem*, who is aſſigned for the purpoſe of anſwering, and defending the ſuit; and this is agreeable to the language of the order aſſigning him the infant's guardian.

Ord v. *Ord.*

15 March 1771.

Legacies to be paid at twenty-one or marriage to infants, two of whom did not attain twenty-one or marry; if the perſonal eſtate had been ſufficient (which was not the caſe), it was contended that the legacy would have veſted, and therefore it was propoſed, to throw another legacy on the real eſtate, in order to leave a ſufficient perſonal fund. But the Court refuſed ſo to do, and declared that the repreſentatives of the deceaſed legatees were not entitled to have their legacies raiſed out of the real eſtate.

WILLIAM Ord by his will gave 5000 *l.* to four daughters to be paid at twenty-one, or marriage, and intereſt at 5 *per cent.* for maintenance; and charged his real eſtate with the payment of the ſame.

Upon hearing the cauſe the 6th *July* 1768, the Court declared the four daughters at twenty-one, would be entitled to be paid the legacy of 5000 *l.* each; and the ſaving of the intereſt, after allowing for their maintenance; and directed an account of the perſonal eſtate; and the 5000 *l.* to be paid into the Bank, and laid out.

On the 18th *February* 1771, the Maſter made his report, and thereby certified, that the perſonal

Ord v. *Ord.*

eſtate would be deficient to anſwer the legacies; and therefore part of it was a charge on the real eſtate.

After the decree, *Elizabeth.* and *Suſanna*, two of the daughters, died under twenty-one.

The cauſe came on this day for further directions.

The plaintiffs the other daughters, contended, that the ſaid deceaſed infants, if the perſonal eſtate had been ſufficient, would clearly have had a veſted intereſt in their reſpective legacies; but they being a charge on the real eſtate there was a doubt; and being a doubt, it was preſſed to take the legacy of 10,000 *l.* given to the plaintiff *Jemima*, out of the perſonal eſtate, and apply it in payment of the two deceaſed ſiſters' legacies, and turn *Jemima*'s legacy on the real eſtate, which was charged with it.

The caſes cited were, *Jackſon* v. *Ferrand*, 2 *Vern.* 424; *Bradley* v. *Powel*, *Forreſter's Reports* 193; 2 *Eq. Ca. Ab.* 253. 657; *Deltrich* v. *Carthen*, 1 *Levin*, 224, *Dyer* 214, 44; anonymous caſe, 2 *Vern.* 403; *Cotton* v. *Cotton*, by Lord *Harcourt*, 2 *Vern.* 290; *King* v. *Withers*, *Forreſter's Reports* 117, and 3 *P. Wms.* 414; *Whitfield*'s caſe, 2 *Vern.* 513; *Graves* v. *Mattiſon*, reported in Sir *Thomas Jones*, 201; *Hutchins* v. *Foy*, *Comyns Rep.* 716; *Bruen* v. *Bruen*, *Prec. Ch.* 195; *Prowſe* v. *Abington*, 1 *Atk.* 482.

Lord *Bathurſt* C. ſaid, he was clear the legacies of the deceaſed infants did not veſt; that he never heard of marſhalling aſſets where only one fund was chargeable:

And therefore declared, that the late plaintiffs, *Elizabeth*, and *Suſanna*, having died under the age of twenty-one, and unmarried, the defendant *Ann Ord*, as

as their perſonal repreſentative, was not entitled to have their legacies of 5000 *l.* raiſed out of the teſtator's, their late father's, real eſtates. *Ord* v. *Ord.*

Vere v. *Glynn.*

15 March 1771.

Amending a bill after a plea is not allowing the plea. If after an injunction the plaintiff amend his bill, the amendments cannot be uſed in ſupport of the injunction.

AFTER the defendant had pleaded, the plaintiff amended his bill. Upon arguing the plea this day, it was contended, that amending the bill after a plea is allowing the plea.

By Mr. *Perrin*, for the defendant, it was ſaid, that amending a bill puts the original bill out of Court, and the proceedings are on the amended bill; and if you plead to the amended bill, you muſt plead *de novo*.

Lord *Bathurſt* C.—This cannot be: for the original, and amended bill are but one record: the time of filing the original bill is not altered; and it is only amended, and written on: amended by virtue of an order dated on a day ſpecified. A bill of ſupplement is a diſtinct record.

And as to what is ſaid, that after a bill is amended the proceedings are on the amended bill, that is, on the original bill ſo amended; if a plaintiff obtains an injunction on his original bill, and the defendants anſwer, and the plaintiff amends his bill, the proceedings to get rid of the injunction are on the original bill, and the anſwer to it; and the amendments cannot be uſed in ſupport of the injunction.

Therefore, over-rule the plea.

Doolittle

10 May 1771.

Doolittle v *Walton.*

Injunction to prevent transfer of ſtocks, not granted till after the defendant's appearance, or being in contempt, and upon notice.

ON the 8th inſtant, a motion for an injunction was granted as of courſe.

When inſtructions were left to draw up the order, it was then, for the firſt time, diſcovered, that it was to prevent the defendants transferring ſtocks, and that the defendants had not appeared. Upon my refuſal to iſſue the order, Mr. *Fleming* ſerved me with a notice, and this day moved that I might be directed to draw up the order: it was moved by the Attorney General Mr. *Thurlow.*

Lord *Bathurſt* C.—There are four kinds of injunctions under the head of waſte: working of mines, printing and publiſhing books, &c., cutting down timber, or ploughing up ancient meadow, and preſenting to livings; but this Court will not grant an injunction to prevent the transferring of ſtock till after the defendants have appeared, or the defendants are in contempt for want of it, and upon notice; and therefore the Regiſter did right in ſuſpending the order.

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3 June 1771. 6 Bro. P. C. 575. S. C.

Welby v. the Duke of *Rutland.*

Bill for an iſſue to try a right to a manor, diſmiſſed.

BILL to have an iſſue directed to try a right to the manor in queſtion.

The caſes cited were, *Buſh* v. *Weſton*, bill *quia timet*, *Prec. in Ch.* 530; Duke of *Dorſet* v. Serjeant *Girdler*, *Prec. in Ch.* 530; Corporation of *York* v. *Pilkington*, 5th *Dec.* 1737; re-argued 13th *March* 1737-8.

The bill was diſmiſſed, and the diſmiſſion, on appeal, affirmed by the Houſe of Lords.

Newton v. *Newton.*

5 June 1771. Lord Bathurſt C.

AN iſſue directed to try whether the plaintiff, or the defendant was heir at law.

Hopkins v. *Adcock.*

6 May 1772.

Effects ſequeſtered falling ſhort of a duty decreed, the order for the Serjeant at Arms reſerved for the reſidue.

EFFECTS ſequeſtered, amounting to a very ſmall part of the duty decreed: the plaintiff obtained an order, for payment and delivery of the ſequeſtered goods, and that the order for the Serjeant at Arms and warrant, ſhould be renewed for the reſidue. It was admitted, that at law, after a *fieri facias* executed, if other effects are diſcovered, another *fieri facias* may regularly iſſue, or a *capias ad ſatisfaciendum* (*a*).

If a *capias ad ſatisfaciendum* is executed, no *fieri facias* can iſſue; but after a *fieri facias* is executed, the plaintiff, if not ſatisfied, may ſue out a *capias ad ſatisfaciendum.*

(*a*) *Sed Qu.* if in the ſame county. J. D.

Adams v. *Gould.*

10 June 1771. Lord Bathurſt C.

THE defendant, an infant, who was the deviſee of the equity of redemption of a copyhold eſtate, and decreed to join in a ſale at twenty-one, (after much conſideration,) had liberty to ſhew cauſe againſt it when he attained the age of twenty-one; and he was to be ſerved with a ſubpœna for that purpoſe.

Wainwright

28 June 1771.

Wainwright v. *Healy.*

Interest to be computed on the sum reported due to the plaintiff, not confining it to the principal.

BILL by the first creditor by judgment on the estate of *James Newsome Craggs*. There had been a decree in another cause for an account of the personal estate, and of the debts of the said *James Newsome Craggs*, under which decree the plaintiff had come in, and the Master had taken an account, and reported what was due to him. On hearing the cause the above day, Lord *Bathurst* C. ordered the Master to compute *interest on the sum reported due to the plaintiff*, from the foot of his report.

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4 July 1771.

Seal v. *Tichener.*

On the point, whether legacies were a charge created, and whether vested and transmissible.

THE bill was filed by the representatives of two legatees to be paid two legacies of 20 *l.* each, given by the will of *Henry Sheffield*, payable after the death of the testator's wife, they having died in the life-time of the widow.

The cause stood this day for judgment.

Lord *Bathurst* C.—This bill is brought by the plaintiffs as representatives of two legatees under the will of *Henry Sheffield*. He by the will devises two houses to his wife for life, and after his death to the defendant *Tichener*, he paying thereout 20 *l.* a-piece to *Henry Thornton*, and *Thomas Thornton*, with interest from the end of three months after the death of the wife; the wife survived, and the legatees died in the life-time of the wife.

The

Seal v. *Tichener.*

The queſtions in the cauſe are, firſt, whether the words in the will, *he paying thereout*, create a charge:

Secondly: whether the legacies veſted, and were tranſmiſſible.

Hutchins v. *Foy*, *Comyns Rep.* 716; *Buckly* v. *Stangate*, *Forreſter's Rep.*

The words, *he paying thereout*, I am of opinion make the legacies a charge on the houſes, as they are given to the defendant *cum onere*, and were tranſmiſſible.

Hodgſon v. *Rawſon*, 9th *December* 1747, 1 *Veſ.* 44; *Wilſon* v. *Spencer*, 3 *P. Wms.* 172.

Therefore declare the two legacies of 20 *l.* a-piece given to *Henry Thornton* and *Thomas Thornton* by the will of *Henry Sheffield*, veſted in them, and were tranſmiſſible to their repreſentatives, and are a charge on the two houſes deviſed to the defendant, and let the Maſter compute intereſt on the ſaid legacies; and let the principal and intereſt of the ſaid legacies be raiſed by ſale or mortgage of the ſaid two houſes, and be paid to plaintiffs, together with their coſts.

Chriſtopher v. *Chriſtopher.*

Serjeants Inn Hall
6 July 1771.

THIS cauſe ſtood for judgment.

Alteration of a teſtator's circumſtances, namely, marrying and having a child, held to be a revocation of the will.

Mr. Baron *Perrot*.—This bill is brought by the heir at law of *Daniel Chriſtopher* deceaſed to have a will made by him revoked; to have an account of the profits of his real eſtate, and an account of his perſonal eſtate, and to have an allowance ſettled for his maintenance upon this caſe.

Perrot, Baron, *contra.*

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Daniel Chriſtopher, by will, dated 17th *December* 1757, being at that time a married man, but without iſſue, deviſed his real, and perſonal eſtate to his then wife for life; remainder to his brother the defendant *Chriſtopher* in fee, and abſolute property.

The wife died in 1761, and on the 10th of *November* 1763 the teſtator married *Elizabeth*, a defendant in this cauſe, and died in 1764, leaving his ſaid wife, and one child, the plaintiff, and without having revoked his will.

The Baron ſaid, he found he differed in opinion with his Brothers; but this he was the leſs concerned at, as perhaps it might be the means to carry to the laſt reſort a queſtion which he thought of the greateſt conſequence to the ſubject, and by theſe means every Court would in future be uniform in their opinion upon it.

That the Spiritual Court had already determined the will in queſtion to be revoked by the alteration of the circumſtances, in which the teſtator was as above mentioned; but he was of opinion it was not a revocation of a will of lands.

Every one knew, he obſerved, that both before and ſince the ſtatutes enabling a man to deviſe lands, ſuch wills might be revoked by parol, or any other ſuch mode, which manifeſted an alteration of intent, in the mind of the teſtator. This let in many inconveniencies at the expence of perjury, and occaſioned the making of the Statute of Frauds, the preamble of which the Baron ſtated, and the 5th ſection of the mode of deviſing lands, and obſerved the difference between the penning of the two clauſes, relating to revocations

revocations of deviſes of lands, and of perſonal eſtate: The firſt is, an expreſs excluſion of all other manner of revocation; the other is a reſtriction upon the method of revoking a will of perſonal eſtate, by words, or writing, having all other methods exiſting; the words of the firſt, are both negative and affirmative, excluding all other manner of revocation, as by accident, &c. He ſaid he could not find any ſubſtantial difference between revocations by deed, and by alteration of circumſtances; he thought the ſtatute meant to exclude all parol evidence in every caſe of revocation, except that neceſſary one, of the alteration of the atteſtation of the inſtrument of revocation, and that the reaſon of the ſeveral caſes, why incomplete deeds, as feoffment without livery, bargains and ſale without inrolment, releaſe without leaſe, well put together in *Gilbert's Deviſes*, p. 93, will operate as a revocation, depends upon this, that wills being ambulatory till the death of the teſtator, the ſeveral informal acts above referred to, countermand, and determine the will; he thought the preſent caſe was one within the ſtatute, and as open to perjury as any other, that is, the diſpute concerning the reality of a ſubſequent marriage, the legitimacy of the children, and that the ſtatute meant to have an actual, not a preſumptive revocation; that it would let in proof of declarations of the teſtator, that he intended his will to ſtand, notwithſtanding ſuch alterations of circumſtances; that in *Parſons* v. *Lanoe*, 1 *Veſ.* 189. Lord *Hardwicke* C. ſeemed not well ſatisfied with the caſe of *Lugg* v. *Lugg*, 1 Lord *Raymond* 441, that marrying and having children afterwards was a revocation of a will of perſonal eſtate; that the caſe of *Brown* v. *Thompſon*,

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v. *Thompſon*, 1 *P. Wms.* 304, 1 *Eq. Ca. Ab* 413, was taken up without argument: He ſaid, he thought the preſent bill a reaſonable one (but did not ſtate in what particular), and relied on the inadmiſſibility of parol evidence; that in the only inſtance where it had been received, that of *Brown* v. *Thompſon*, two great men, Sir *John Trevor* and Lord Keeper *Wright*, differed in what ſuch alteration of circumſtances conſiſted, as appears in 1 *P. Wms.* 304, in the note, and obſerved that from that time, (which was in 1701) to the preſent, there was no determination in favour of any ſuch implied revocation; that there was a great deal in the caſe, which ſpoke to the feelings of humanity, but ſtill Courts could not determine from principles of peculiar hardſhips; it was their duty *jus dicere, non dare*, and ſo concluded againſt the plaintiff.

Mr. Baron *Adams*.—I am of opinion, the alteration in the circumſtances of the teſtator, amounts to an implied revocation; true it is, the teſtator was married at the time of making his will; but I ſhall conſider that matter, as if he had been then a bachelor.

I hold it as a rule, that wills do not take effect from the time of the execution, but the death of the teſtator; that till then they are ambulatory.

The doctrine of revocation of wills, hath ariſen from caſes ſince the ſtatute of wills: there can be no revocation, but by expreſs declaration of the teſtator, or by implication of law; by the latter, by acts done contradictory to, or inconſiſtent with ſuch wills; upon this principle, that they ſhew the intention, that lands ſhould not paſs by ſuch will: even deeds not fully executed, or improperly, as for want of attornment, &c. are a revocation, *Roll*'s *Abridgment. Tit. Deviſe*,

Deviſe, fol. 614, 615, not as actual, but implied revocations: ſo as to inconſiſtent acts, *Cook* v. *Bullock*, *Cro. Car.* 49: ſo by ſubſequent acts, though the fee returns to, or remains in the teſtator, *Rolls Abridg.* 660; and *Parſons* v. *Freeman*, 3 *Atkins* 741. Theſe caſes ſhew how the law watches the intention of the teſtator, that it ſhould continue as before, until his death.

Thus matters ſtood until the Statute of Frauds: for no proviſion being made in the Statute of *Henry* the 8th, concerning revocation, the Judges allowed of parol proof, which being inconvenient, that ſtatute meant to provide againſt it; *but left implied* revocations as before.

My learned Brother *Perrot*, thinks this lets in the miſchiefs, the ſtatute meant to prevent: I think it doth not: declarations made by a teſtator lie open to perverſion; but in this caſe, it is not declarations, but facts (as a ſubſequent marriage, and having children), are to be proved, which are notorious matters.

Before the Statute of Frauds, the will of a ſingle woman marrying afterwards, was held void, 4th *Co*; and though there hath been no ſuch determination ſince the ſtatute, I doubt not the reſolution would be the ſame.

It muſt be admitted the ſtatute is ſtrong, but yet it hath been determined in many caſes, that it hath not taken away revocations by implication, *Diſter* v. *Diſter*, 3 *Levins*, 108; and Lord *Lincoln*'s caſe, 1 *Eq. Caſes abridged* 411, *Sparrow* v. *Hardcaſtle*, 3 *Atk.* 798, and *Eccleſton* v. *Speke*, *Carthew Reports*, 79. Here the circumſtances of the teſtator, are to be conſidered: when he was without a child he had left his eſtate

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to his neareſt relation, his brother; but when he had a child, it became dependent on him for ſupport: moral duty, and natural love called upon him to give it a preference to every body.

It is therefore *a neceſſary preſumption*, that he intended his fortune for the benefit of his child, and if a bare alteration by an incomplete feoffment, &c. ſhall be a preſumption of a change of intent: ſhall not marriage, and a child born be a ſufficient preſumption?

So it was held in *Brown* v. *Thompſon*, 1 *Eq. Ca. Abr.* 413, and the determination of *Love* v. *Love* in the Eccleſiaſtical Court, whereby marriage, and the birth of a child are a revocation of a will of a perſonal eſtate, is a foundation for us; and this opinion is contradicted by no caſes.

In *Parſons* v. *Lanoe*, 1 *Veſ.* 189, there was a child only, without a ſubſequent marriage: In *Jackſon* v. *Hurlock* (*a*), before Lord *Northington* C. a will was made immediately before marriage, and in contemplation of it.

(*a*) Ambl. 487.

I will not give any opinion, what would be the conſequence of a marriage only, or having a child only, after making a will: but in this caſe, both marriage, and iſſue happening after the will, I think thoſe alterations of circumſtances, a revocation of the will.

Mr. Baron *Smith* ſaid he was of opinion, that this was an implied revocation of the will: that the oldeſt method of deviſing was by cuſtom; next by feoffment to the uſes of the laſt will; then the Statute of *Henry* 8th, gave a general power; then came the Statute of Frauds, which let in a teſtamentary conſtruction.

That

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That at common law a favourable conſtruction is to be put upon the intent of parties; and in equity, where a man, being *ceſtui que truſt*, having only a daughter, declared that after his death ſhe ſhould have his lands, but had a ſon afterwards, it was held the ſon ſhould have the land, as cited in *Shelly*'s caſe, 1 *Co.* 100 b.; which caſe is alſo cited with approbation ſince the Statute of Frauds, in 2 *Vern.* 416: that revocations, by operation of law, though not actually, yet were virtually excepted in the Statute of Frauds, as in *Levins*, 108, 3 *P. Wms.* 163 and 170: that the danger of perjury lay in allowing of parol proof of *declarations*, not of facts: and that even under the ſtatute, there muſt be parol evidence admitted; as where a will is burnt, torn, cancelled, or deſtroyed, by the teſtator's directions: and ſo concluded for the plaintiff.

Lord Chief Baron *Parker* agreed with Mr. Baron *Adams* and Mr. Baron *Smith*, and founded himſelf much on the caſe cited by Mr. Baron *Smith* out of 1 *Co.* 100 b., and in 2 *Vern.* 416; and in addition mentioned *Roper* againſt *Ratcliffe*, in 1712 (*a*), where a deviſe to a papiſt, though incapable of taking, was held a revocation.

(*a*) 2 Eq. Ca: Abr. 771.

And the Court declared that a ſubſequent marriage, and a child born were a revocation of the will, and that the eſtate deſcended to the daughter, ſubject to the wife's dower; and that the perſonal eſtate was to be divided (agreeably to the determination concerning this will in the Spiritual Court) according to the ſtatute, and that the plaintiff the daughter was entitled to two thirds; and ordered an account accordingly, and directed coſts to be paid out of the eſtate.

11 July 1771. Lord Bathurst C.

Fell v. *Hornby.*

BILL for an account of the defendant's perſonal eſtate, and of what he had given, or agreed to give to another with his daughter; he having, on the marriage of one of his daughters with the plaintiff, engaged to make his daughters equal. The defendant demurred: the demurrer was over-ruled. *Smithſon* v. *Lewis*, 1 *Vern.* 398, 399, was cited.

11 July 1771.

Young v. *Dennet.*

THE teſtator deviſed all his eſtates to *James Holmes* his brother (who was his heir at law) in fee, ſubject, and liable to the payment of his debts and funeral expences, and appointed him executor. Lord *Bathurſt* C. held the deviſe to him *as heir*, to be void, and that the eſtate conſequently deſcending to him was legal aſſets, in conformity to the caſe of *Fremoult* and *Didire*, 1 *P. W.* 429.

13 July 1771.

Vernon v. *Wells.*

Exceptions to an award under an order of reference to an arbitrator.

LEWIS *Chauvet* Eſquire, a purchaſer of part of the eſtates in queſtion, on the 30th of *October* 1770, preferred his petition to the then Lords Commiſſioners for the cuſtody of the Great Seal; ſhewing (*inter alia*) that he had been reported the beſt purchaſer of lot 2d, in the particular mentioned to contain 106 acres, at the price of 4700 *l.*, but that ſuch lot did contain no more

more than 84 acres; and therefore prayed a proportionable allowance out of his purchaſe money.

On the 22d *December* 1770, the petition came on to be heard, and was ordered to ſtand over; and in the mean time it was ordered that the defendants' ſolicitor ſhould, according to his undertaking in Court, ſhew to *Elliot Biſhop* Eſquire, at ſuch time as he ſhould appoint, the land, according to the particular under which the petitioner purchaſed, and Mr. *Biſhop* was to certify his opinion.

On the 12th *March* 1771, the defendants preferred their petition to the Lord Chancellor, ſetting forth (amongſt other things), that the defendants' ſolicitor had ſhewn the land to Mr. *Biſhop*, and that he was ready to make his report concerning the ſame; and therefore prayed, that Mr. *Chauvet*'s petition might be ſet down to be heard upon Mr. *Biſhop*'s report, and that the ſame might be diſmiſſed, and the defendants paid their coſts.

On the 20th *March* 1771, both petitions came on, and Mr. *Biſhop* attended in his place at the bar, and delivered in Court a report in writing, which was offered to be read, but objected to by the Solicitor General (Mr. *Wedderburne*), Counſel for Mr. *Chauvet*, who inſiſted that the report ought to be filed, and confirmed, before the defendants had a right to ground any order upon it; and that Mr. *Chauvet*, after the report was filed, had a right to take exceptions to it. Mr. *Ambler*, for the defendants, inſiſted that the reference was only to procure better evidence of a fact, than had been made out by affidavit, and that *Chauvet* had not any more right to require this evidence, in the ſhape of a report, to be filed, and confirmed, than he would have had to require Mr.

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Biſhop's affidavit to be filed, and confirmed, if he had thought fit, to make one to the ſame effect as his report (*a*); and that he might have done ſo if he had pleaſed, or even made a verbal report at the bar, or none at all; for that the Court did not require him to make any report, but only directed the petition to ſtand over until the defendants' ſolicitor had ſhewn the land; and that any exception Mr. *Chauvet* had to the report, might be taken at the bar.

The Solicitor General in reply inſiſted, that Mr. *Biſhop* was, in fact, *an arbitrator* between the parties; that any reference to an arbitrator required an award, or report in purſuance of it: that, by the courſe of the Court, ſuch award, or report ought to be filed, that any party aggrieved might except thereto, ſo as to put the whole matter upon record; and that, if it were otherwiſe, the injured party would be without evidence upon an appeal. Upon his Lordſhip's conſulting the bar, and Mr. *Howard*, who then ſat as Regiſter, they coincided with Mr. Solicitor General, and the report was ordered to be filed.

The report was accordingly filed; and on the 9th of *April* 1771, an order was made to confirm it *niſi*; Mr. *Chauvet* filed exceptions to the report, which were argued on the 15th *July* 1771, and over-ruled.

(*a*) Mr. Ambler was miſtaken; for had it been by way of affidavit, by the ſtanding orders of the Court, no affidavit is to be given in evidence until it is filed, and put upon record; which ſeems highly proper; for ſhould a deponent be found to have ſworn falſely, his affidavit, unleſs filed, might not be forthcoming, on which to indict him.

J. D.

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19 July 1771. Lord Bathurſt C.

Botts v. *Verelſt.*

(Reg. Lib. A. fol. 327.)

APPLICATION to examine a witneſs *de bene eſſe*, upon affidavit he was going to *Scotland*. After long debate, it was ordered; *Scotland*, although not out

out of the realm, being out of the juriſdiction of the Court to compel the witneſs to attend to be examined, when he arrived there. *Botts* v. *Vereſt.*

Smith v. *Clarke.*

24 Aug. 1771. Lord Bathurſt C.

NOTICE of motion for an injunction to ſtay the working of coal mines, ſaved, until the firſt ſeal after Michaelmas, the defendant undertaking not to do any thing in the mean time. After the ſeals ſubſequent to *Trinity* Term were over, the defendant began to ſink a pit. On application by petition, an injunction was granted.

Goodeſon v. *Gallatin.*

10 Dec. 1771.

UPON application for an injunction:

The origin of the juriſdiction of this Court in regard to injunctions, and to what extent,

Lord *Bathurſt* C. ſaid, that when this Court firſt granted injunctions, it ſeems to have taken it's juriſdiction from the writ of prohibition of waſte; and to have extended it againſt a tenant for life, or a tenant for years from ploughing ancient meadows, from throwing down ancient incloſures, which, though not ſtrictly, is of the nature of waſte; from printing books, and from exerciſing new inventions; from the working of mines, poſſeſſing bills now out of uſe in this kingdom, but ſtill in uſe in *Ireland*; and this Court will grant an injunction whether covenant, or no covenant. The grantor of a common overſtocks it; this Court will grant an injunction. 2 *Vern.* 116.

20 Jan. 1772.

Durand v. *Hutchinſon.*

MOTION to amend a bill by ſtriking out a party, and making him a defendant, after bill diſmiſſed.

The Court gave the plaintiff leave to amend, paying all coſts.

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7 Feb. 1772.

Errington v. *Evans.*

The teſtator's making of a bond debtor one of his executors, does not extinguiſh the debt.

THE queſtion in this cauſe was, whether a bond debt due to the teſtator from one of the defendants, who was one of the executors, and proved the will, was extinguiſhed.

It was argued by Mr. Attorney General, that a perſonal eſtate, of which the bond is part, is in law a gift to the executor; but that it was a gift operating only by concluſion in law, and not as the intent of the teſtator.

In *Wankford* v. *Wankford*, in *Salkeld* 299, it is expreſsly laid down, that making a debtor an executor, is making him a ſpecific legatee as to the debt, and not to be taken away from him to make other legatees equal to him, nor for the benefit of a reſiduary legatee.

In *Brown* v. *Selwyn* the words of the will were: "As to the reſt, reſidue, and remainder of my perſonal eſtate, I give the ſame, and every part thereof, unto ſuch of my executors as ſhall duly take on him, or them the execution of my will."

Lord

Errington v. *Evans.*

Lord Chancellor.—I take it upon the foot of the will.

Where an obligee makes an obligor *one* of the executors, and takes no notice of the bond, but deviſes the reſidue of the eſtate to others, I am clear it is not an extinguiſhment of the debt, though at law it will be ſo, becauſe a perſonal demand once ſuſpended is not to be reſumed.

Therefore, declare that the bond is to be conſidered as a debt ſubſiſting at the death of the teſtator, and to be accounted for as his perſonal eſtate; and let the defendant *Evans* account accordingly.

Clare Hall v. *Orwin.*

22 Feb. 1772.

The queſtion in the cauſe being between perſons in their eccleſiaſtical capacity, this Court would not interfere, but left it to the Eccleſiaſtical Court, as being the proper Court to determine it.

THE bill was filed againſt ſeveral leſſees, and vicars for tythes in kind.

By the defendants it was contended, that the queſtion being between eccleſiaſtical perſons, it ought to be determined by the Eccleſiaſtical Courts.

The plaintiff, on the contrary, inſiſted, that a Court of Equity had a juriſdiction, and, in reality, was the proper Court, and quoted a paſſage out of Biſhop *Gibſon*'s works.

The Biſhop ſays, though there is not any reaſon that the lay fee ſhould not be ſubject to eccleſiaſtical juriſdiction, as well as the Exchequer; yet the Courts at *Weſtminſter* have ſo often determined againſt it, that it is evident the Eccleſiaſtical Courts have not ſuch juriſdiction.

The

Clare Hall v. Orwin.

The cases cited were, *Twiss* v. Brazen Nose College, 328; *Brook, Tit. Jurisdiction, placito* 9; *Drake* v. *Taylor*, *Strange Rep.* 87.

Lord Chancellor.—This bill is brought by Clare Hall against lessees, and vicars for tythes of corn.

The vicar sets up a right to tythes in kind.

About three centuries after the conquest, the isle of *Ely* was one of the most fertile parts of *England*, till the floods broke in upon it; but at what particular period that happened, antiquarians differ.

The question between the vicar, and rector is, who shall be entitled to all the great tythes.

It is rightly laid down, that, *primâ facie*, the rector is entitled to all great tythes: it is, therefore, incumbent on the vicar to prove his right, contrary to the rector.

The question then is, whether the vicar has shewn a title.

If the dispute arise between ecclesiastical persons, it is right for the Spiritual Court to determine it; and it is so laid down in 1 *Leonard*, 58.

Suppose that there had been an action, or a dispute between an hospital and vicar, as to great tythes in any particular lands, it would have been determined in the Spiritual Court.

Coming into lay hands, the Spiritual Court could not determine it.

This matter evidently occurs between ecclesiastical persons: therefore, let the bill be dismissed.

Blake

Blake v. *Blake.*

28 Feb. 1772.

(Reg. Lib. A. fol. 164.)

Application to approve of the marriage of an infant, under the ſtat. 26 Geo. 2. the teſtamentary guardian being in parts beyond the ſeas.

Andrew Blake, by his will, dated the 1ſt of *July* 1760, appointed Sir *William Gage*, *Robert Harland* Eſquire, now Sir *Robert Harland*, and Serjeant *Hooper*, truſtees, and guardians of his younger children. *Mary Ann Blake* was one of ſuch children. Sir *William Gage* acted as guardian till his death, when *Patrick Blake* was appointed guardian by the Court, for the purpoſe of receiving, and applying the money allowed for the maintenance, and education of the infants; *Hooper* having been dead many years, ſo that Sir *Robert Harland* was the ſurviving truſtee.

A marriage having been propoſed between Lord *Montfort*, and the ſaid *Mary Ann Blake*, the ſame was, upon a reference to the Maſter, approved, and ordered to be carried into execution. Sir *Robert Harland*, the only ſurviving teſtamentary guardian, being the commander of a ſquadron of ſhips in the *Eaſt Indies*, ſo that his conſent could not be had to the intended marriage, as by the ſtatute of the 16 *Geo.* 2. is required, the ſaid *Mary Ann* the infant preferred her petition to Lord *Bathurſt* C., ſtating to the above effect; and praying that, in caſe, upon examination, the ſaid intended marriage ſhould appear to be proper, that his Lordſhip would declare the ſame to be ſo, purſuant to the ſaid act of parliament.

Upon this petition the parties were ordered to attend his Lordſhip, on the above day, which they did; and the petitioner *Mary Ann Blake* having attended him, by his direction, at his houſe, his Lordſhip

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ſhip having converſed in private with her reſpecting the ſaid intended marriage, and having given her time to conſider thereof until this morning, and having received a letter under her hand, deſiring his Lordſhip's conſent to the ſaid intended marriage, declared the ſame to be a proper marriage.

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4 March 1772.

Lloyd v. ———

ONE of the defendants was a lunatic. The committee of his eſtate was alſo a defendant; he refuſing to put in an anſwer for the lunatic, Mr. *Kenyon* moved, on behalf of the plaintiff, that the committee might put in an anſwer for the lunatic by a given time; or that one of the Six Clerks might be appointed guardian of the lunatic *ad litem*. Sir *Thomas Sewel* M. R. ſaid, the proper courſe was, to proceed againſt the lunatic; and if the committee refuſed to anſwer, to apply to the Great Seal to appoint a new committee of the eſtate.

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27 March 1772.

Bathurſt v. *De la Zouch.*

BILL againſt an executor for an account. The defendant had become bound with the teſtator in a bond for another perſon. The only queſtion was, whether he ſhould be at liberty to retain it out of the teſtator's eſtate.

(*a*) 29 July 1772.

Lord Chancellor, on a ſubſequent day (*a*), determined that the defendant was entitled to retain the whole of what was due on the bond.

Hooley v. *Hatton.*

16 May 1772. 1 Bro. C. C. 390. in not.

Where a larger legacy, by a codicil, was held not to be a ſatisfaction of a legacy by the will.

LADY *Cecilia Iſabella Finch*, by her will, dated 30th *Auguſt* 1760, gives the plaintiff 500 *l.*, payable in three months after her death, with intereſt.

By a codicil, dated 21ſt *October* 1768, ſhe gives the plaintiff an annuity of 12 *l.* for her life.

By a ſecond codicil, dated 21ſt *October* 1769, expreſſing it to be a codicil to her will, ſhe gives the plaintiff 1000 *l.*, but doth not direct any time of payment.

The plaintiff brought her bill for payment of both legacies; and upon hearing the cauſe at the Rolls, both were decreed.

The cauſe came on this day (*a*) on an appeal from that decree; when it was inſiſted, that the legacy by the ſecond codicil was to be conſidered as an ademption of the legacy by the will.

(*a*) 16 May 1772.

The caſes cited were, *Maſters* v. *Maſters*, 1 *P. W.* 421; Duke of *St. Albans* v. *Beauclerk*, 2 *Atk.* 696; 1 *Bro. C. C.* 392, in not.; *Brown* v. Duke of *Bolton*, determined by Lord *Camden*.

The cauſe was afterwards (*b*) re-argued before the Lord Chancellor, aſſiſted by Lord Chief Baron *Smith*, and Mr. Juſtice *Aſton*.

(*b*) 6 Feb. 1773.

Mr. Juſtice *Aſton*.—The appeal is from ſo much of the decree as declares the plaintiff entitled to the legacy of 500 *l.* given by the will, and the 1000 *l.* given by the codicil; the defendants inſiſting, that the legacy of 1000 *l.* is a ſatisfaction of the legacy by the will.

The ſureſt way to determine a caſe of this kind is, to conſider the intention of the teſtator.

The

Hooley v. *Hatton.*

The legacy of 500 *l.* is payable in three months, with intereſt. The legacy by the codicil is without any time of payment prefixed to it, or mention of intereſt; which, of courſe, will not be payable until a year after the teſtator's death.

Had ſhe meant it as a ſatisfaction, it would have been eaſy for her to have ſaid, I revoke the legacy of 500 *l.*, and in lieu of it I give her 1000*l.*

Many arguments have been urged, and many caſes cited, but they leave the matter ſtill neutral. Upon the whole, I conclude, the teſtatrix did not mean the legacy by the codicil to be a ſatisfaction of the legacy by the will; therefore, I think the plaintiff is entitled to both, and that the decree is right.

Lord Chief Baron *Smith*, for the reaſons given by Mr. Juſtice *Aſton*, concurred with him, that the plaintiff was entitled to both legacies.

Lord Chancellor.—When the matter was firſt brought on before me, I had ſome doubts; and it being a matter of conſequence, I was deſirous of having further aſſiſtance.

The queſtion in the cauſe it is unneceſſary to repeat.

This Court, in determining on perſonal eſtate, muſt be governed by the Eccleſiaſtical Court, where it has a concurrent juriſdiction.

Where there are two legacies given by the ſame will, it lies on the legatee to prove that the teſtator meant two legacies: but where they are given by two inſtruments, it lies on the *hæres*, to prove that ſuch was not his meaning.

Now, in this caſe, is there any internal evidence? Nothing of that kind is to be collected; therefore, it muſt be determined by general rules.

Hooley v. Hatton.

His Lordſhip cited *Wallop* v. *Hewett*, 2 *Ch. Rep.* 70; *Wyndham* v. *Wyndham*, *Finch Rep.* 267; Governors of *Chriſt's* Hoſpital v. *Gould*, 22 *Feb.* 22 *Car.* 2; *Newport* v. *Kinaſton*, *Finch Rep.* 294; *Pitt* v. *Pidgeon*, 1 *Ch. Ca.* 301; as being all in point.

And the decree was affirmed.

Worthington v Wyrington 26 Jy 1773 MR.

2 July 1772.

John Ardeſoiſe - - - - Plaintiff.

Thomas Bennet, *Thomas Calverley*, and *Elizabeth Wilſon* widow, - } Defendants.

(Reg. Lib. B. fol. 554.)

A. purchaſed a copyhold eſtate, which was ſurrendered to him out of Court, but he died before he was admitted.

Qu. Whether it paſſed by the will?

The heir at law, a feme covert, to whom a legacy of 5000 *l.* was given by the ſame will, for her ſeparate uſe, having conſtantly received the intereſt for five years, was held to have elected to take under the will; and it was determined that her infant heir, who had been admitted, held the premiſes in truſt for the deviſee.

William Dormer, in conſideration of 1200 *l.*, paid by *John Wilſon* on the 5th of *September* 1765, ſurrendered out of Court, into the hands of the Lord of the manor of *Tottenham High Croſs*, in *Middleſex*, certain lands, held of the ſaid manor, to the uſe of the ſaid *John Wilſon* and his heirs.

John Wilſon, immediately upon the purchaſe, made his will, and thereby (amongſt other things) deviſed the ſaid copyhold eſtate to *Elizabeth Wilſon* his mother, a defendant in the cauſe, in fee; and by his ſaid will gave 5000 *l.* to truſtees, to pay the intereſt to his ſiſter *Elizabeth*, then the wife of the plaintiff, for her ſeparate uſe, and the principal, after her death, to her appointment; and in default of her appointment, to her executors or adminiſtrators.

Before the ſaid ſurrender was preſented in Court, and before the ſaid *John Wilſon* was admitted, and conſequently before he could ſurrender the copyhold premiſes

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ſo purchaſed by him to the uſe of his will, he died; namely, on the 10th of *October* 1765, leaving his ſaid ſiſter *Elizabeth* his heir at law.

On the 19th of *April* 1766, at a Court then held, the ſaid defendant was admitted to the copyhold premiſes as deviſee.

She continued in poſſeſſion, without interruption, till the death of *Elizabeth*, the plaintiff's late wife, which happened about five years after, when the plaintiff, as guardian to *John*, his infant ſon, the heir of the ſaid *Elizabeth*, procured him to be admitted to the copyhold premiſes. *Elizabeth*, the plaintiff's late wife, the legatee, continued to receive the intereſt of her legacy of 5000 *l.* to her death; and ſhe dying without having made any appointment of it, the plaintiff her huſband took out adminiſtration to her; and in right thereof claimed the ſaid legacy, and filed his bill to have the funds, in which the ſame was inveſted, transferred to him.

The defendants, by their anſwer, ſubmitted, that as the legacy to the heir was of greater value than the copyhold, the deviſees ought to be ſatisfied the value of the ſaid copyhold premiſes, in caſe the deviſe thereof ſhould be void, out of the ſaid legacy.

(a) Reg. Lib. A. fol. 394.

The cauſe came on the 18th of *June* 1771 (*a*), before Sir *Thomas Sewel* M. R. but *John Ardeſoiſe*, the infant heir at law of *Elizabeth* the plaintiff's late wife, not being a party, his Honour declared, "the plaintiff as adminiſtrator of the ſaid *Elizabeth* his wife, was entitled to the funds in which the ſaid legacy of 5000 *l.* was inveſted, ſubject to any ſatisfaction, which upon the determination of the above queſtion, the plaintiff might be liable to make to the defendant *Elizabeth*

Elizabeth Wilson, the mother of the testator, respecting the said copyhold premises; and by consent 1600 *l.* East India annuities were to be transferred to the Accountant General, to make good to the said defendant *Elizabeth*, what she might be deemed entitled to, in case she should lose the benefit of the devise;" and the heir at law not being a party in that cause, the said cause as to that matter, was ordered to stand over to be further heard, until the following cause, the said *Elizabeth Wilson* the devisee, plaintiff, the said *Isaac Ardesoife* the father, and *John Andesoife*, the infant heir, defendants, should be brought on, and both causes to be heard together.

Both causes came on to be heard (*a*).

(*a*) 25, 29, & 30 June, & 2 July 1772.

The said *Elizabeth Wilson* by her bill stated the purchase of the copyhold estate by *John* her son; the surrender of it out of Court to the use of him, and his heirs; the devise of it to her in fee; and his death before he was admitted; and her admission to the said premises as devisee thereof, as before stated; and insisted, that though the said *John Wilson* was not admitted, and consequently could not surrender the copyhold premises to the use of his will, yet the devise was good, for the vendor having surrendered the same out of Court, and *John Wilson* the purchaser, having died before the surrender could be presented, and before he, by any act of his, could be admitted; therefore the legal estate, and interest in the said premises, until the surrender was presented, and the said *John Wilson*, or some other person, was admitted to the said estate, under the said surrender, remained in the said *William Dormer* the vendor, as a trustee for

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the ſaid *John Wilſon*; and as the ſaid *John Wilſon* could not procure the legal eſtate and intereſt, in the copyhold premiſes, in order to ſurrender the ſame to the uſe of his will; and by reaſon thereof, being only ſeiſed of a truſt, or equitable intereſt therein, ſuch intereſt was well deviſed, and paſſed by his will; and ſhe inſiſted, that the legacy of 5000 *l.* to the ſaid *Elizabeth Ardeſoife* was in lieu of all claim in reſpect of the ſaid copyhold eſtate; that ſhe lived five years after the plaintiff the deviſee was admitted to the ſaid copyhold premiſes, without ſetting up any claim, and having conſtanrly received the intereſt of the ſaid legacy to the time of her death, it was and ought to be conſidered as making her election to take under the will; and that the ſame ought to be binding and concluſive on the defendant *John Ardeſoife* the huſband and adminiſtrator, and on *John Ardeſoife* her infant heir.

The bill therefore prayed, that the will and the deviſe to the plaintiff, might be eſtabliſhed; and that the copyhold premiſes might be ſurrendered to the plaintiff; and that the defendants might account for the rents and profits.

The defendant *Ardeſoife* by his anſwer, admitted the will of *John Wilſon*, his purchaſe of the copyhold eſtate, and the deviſe of it as before ſtated to the plaintiff *Elizabeth Wilſon*; and alſo that the teſtator gave ſuch legacy of 1000 *l.* and in ſuch manner to *Elizabeth* his ſiſter, and heir at law, as ſtated in the bill; he alſo admitted, that the ſaid copyhold premiſes were ſurrendered out of Court, to the uſe of the ſaid teſtator in fee; and that he died before

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ſuch ſurrender was preſented for admiſſion; but inſiſted, the teſtator might have been admitted, if he had uſed due diligence, by having a ſpecial Court, for that the ſaid ſurrender was on the 5th of *September* 1765, and he died on the 10th of *October* following; and further inſiſted, that the ſaid legacy of 5000 *l.* was not in lieu of all claims on the eſtate of the teſtator; and that *Elizabeth* his, the defendant's, late wife, had not elected to take under the will, as ſuggeſted by the bill.

On this day (*a*), his Honour declared, it appeared from the evidence, that *Elizabeth Ardeſoife*, had made her election to take the 5000 *l.* which appeared to be of greater value, than the copyhold premiſes, and therefore ſhe was bound by ſuch election; and that the defendant *John Ardeſoife* the infant heir, who had been admitted to the ſaid copyhold eſtate, as cuſtomary heir, was likewiſe bound thereby; and that the plaintiff *Elizabeth Wilſon* was in equity entitled to the benefit of the ſaid deviſe; and decreed the infant, when he attained the age of twenty-one years, unleſs he ſhewed cauſe to the contrary, to ſurrender the ſaid copyhold eſtate to the ſaid *Elizabeth Wilſon*, and that ſhe ſhould hold and enjoy it in the mean time; and *Iſaac Ardeſoife* the father was to account for the rents and profits, and to pay the balance to the ſaid *Elizabeth Wilſon*.

(*a*) 2 July 1772, Reg. Lib. B. fol. 554.

17 July 1772.

Bettenſon v. *Winder.*

Payment by an executor, or adminiſtrator of ſimple contract debts, not having any notice of debts by ſpecialty, good payment, and no *devaſtavit*.

ON the 16th of *June* 1737, *John Kerril* executed a bond to *Ralph Boſwel*; *Ralph* died, and appointed *Henry Boſwel* his executor; *Henry* died, and made the plaintiffs his executors, who proved his will: In 1776, *John Kerril* died inteſtate, ſeiſed of real eſtates, which deſcended to *Ann* his heireſs at law, the wife of *William Hughes* one of the defendants; *Mary* the wife of the defendant, obtained letters of adminiſtration of *Kerril*, the inteſtate's perſonal eſtate, and poſſeſſed it, and being ignorant of the ſaid bond, applied the perſonal eſtate in payment of debts by ſimple contract; the plaintiff filed his bill againſt the heir at law, and alſo againſt the adminiſtratrix, for an account of her inteſtate's perſonal eſtate; and to be paid by her perſonally his bond debt, ſhe having, as was inſiſted by the Solicitor General Mr. *Wedderburne*, been guilty of a *devaſtavit*. The Attorney General Mr. *Thurlow* was counſel for the defendants; he argued firſt, that from the length of time ſince the bond was entered into, it was to be preſumed to be ſatisfied, but payment of intereſt on the 1ſt of *July* 1748, being proved, and alſo a letter from the inteſtate in 1752, being an acknowledgment of it, that argument failed.

As to the *devaſtavit*, the Attorney General ſaid, that where an executor, or adminiſtrator does an act, ignorant of a prior demand, and without fraud, or colluſion, devaſtation was not to be imputed to him.

Lord *Bathurſt* C. was clear, that ſimple contract debts paid by an executor, or adminiſtrator, without notice

notice of a bond, was a good payment, and directed an account of what was due on the bond, from the 1ſt of *July* 1748, the time to which intereſt appeared to have been paid, and of the inteſtate's other debts; and likewiſe an account of the inteſtate's perſonal eſtates; and the adminiſtratrix to have credit in ſuch account, for ſuch part of the perſonal eſtate as had been applied in payment of ſimple contract debts, before ſhe had *actual* notice of the plaintiff's demand, and the perſonal eſtate, to be applied in a courſe of adminiſtration. *Bettenſon* v. *Winder.*

Inge v. *Lippingwell.* 20 July 1772.

ON motion for an injunction, in order to ſhew that *an agreement in writing*, may be waived *by parol*, the caſe of *Pitcarn* v. *Hopgood* was cited; and the injunction was granted.

Greames v. *Stritho.* 21 July 1772.

MOTION that the ſheriff might be reſtrained from paying money levied by him; and if any money paid, that it might be refunded, upon the ground, that there was a miſtake; and that the plaintiff had a right to ſet off. Relief where there is a miſtake in a verdict.

Lord Chancellor.—When an action is brought at law, and a verdict, and a miſtake, this Court will ſometimes interfere to have the account properly made out.

Greames v. Strithe.

The action was brought in 1768, and after great delay, the plaintiff in the action recovered a verdict: After a writ of error, the defendant at law files a bill in this Court, charging loſs of papers, and obtains an injunction.

After diſſolving the injunction, the defendant at law files a new bill, charging that the plaintiff at law hath recovered more than is really due to him.

A party may bring his action for what ſum he pleaſes, without making any allowance, but the defendant hath liberty to ſet off.

The queſtion is, whether this Court ought to interfere in this caſe.

If a party at law hath obtained a verdict, and the party hath any equitable demand in this Court, this Court will grant a *ne exeat regno*.

If the party is abroad, this Court will impound the property.

Therefore upon the plaintiff's paying the ſum admited to be due, and ſo much more, as is the amount of the ſum recovered into the Bank, the injunction ſhall be granted.

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25 July 1772. Lord Bathurſt C.

Matthews v. *Matthews*.

THE plaintiff, the widow of the teſtator, was entitled to an annuity of 100 *l.* charged on freehold, and leaſehold eſtates; and by an indenture of ſettlement, dated 9th of *February* 1762, her huſband covenanted to convey the ſame of value to anſwer it; the huſband dying, and the rents and profits not being

being ſufficient to anſwer the annuity, the plaintiff filed her bill to have the deficiency made good. *Matthews* v. *Matthews.*

On hearing the cauſe, the Maſter was directed to take an account of what remained due to the plaintiff for her annuity, deducting what ſhe had received of the rents and profits of the freehold and leaſehold eſtates; and if the rents and profits were not ſufficient to anſwer the annuity, the deficiency was to be made good out of her ſaid huſband's perſonal eſtate, an account of which was directed, and ſufficient of the perſonal eſtate to anſwer the deficiency, or ſo far as the ſame would extend, was to be paid into the Bank, and laid out in the Accountant General's name in Bank annuities, in truſt in the cauſe; and the intereſt to accrue thereon, and ſo much as the rents and profits of the freehold and leaſehold eſtates would make up of the clear yearly ſum of 100 *l.* was to be paid to her, and in caſe the intereſt or annual income of the perſonal eſtate ſhould not be ſufficient for the purpoſe aforeſaid, the plaintiff was to have the deficiency made good out of the *capital* of the perſonal eſtate, and if that were not ſufficient, then out of the freehold and leaſehold eſtates in the ſaid indenture mentioned.

Aſkew v. *Townſend.*

30 July 1772.

BILL to ſtay proceedings at law, on an ejectment under pretence of a forfeiture of a leaſe.

Where a perpetual injunction is decreed, it is not neceſſary to revive upon the death of a party for the purpoſe of keeping on foot the injunction.

On hearing the cauſe, the Court directed the injunction that had iſſued to be perpetual, and the defendant to pay coſts, which were *not taxed*; the

Aſtew v. *Townſend.*

plaintiff dies; his repreſentative files a bill of revivor, under pretence of continuing the injunction; but with a view to the coſts; the defendant demurred, for that no duty remained, but payment of coſts; and not being taxed, the ſuit could not be revived for coſts only; the demurrer came on to be argued: It ſtood over, and after conſideration, Lord *Bathurſt* C. allowed the demurrer, upon this ground, that the decreeing of a perpetual injunction, were it neceſſary to revive upon every abatement, would be in effect, decreeing a perpetual ſuit: beſides, though a ſuit abate, the injunction that may have iſſued doth not drop; the order of courſe, that the repreſentative of a deceaſed plaintiff may revive in a given time, or that the injunction may be diſſolved, evinces it.

The caſe of *Yeomans* v. *Kilvington* in the Exchequer, 7th *April* 1762, was produced (*a*).

(*a*) Supr.

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6 Auguſt 1772.

Gomme v. *Weſt.*

APPLICATION to diſcharge an order by the Maſter of the Rolls, for a perſon to come in, and be examined *pro intereſſe ſuo*, touching a claim on an eſtate, of which a receiver had been appointed by this Court; ſuch order it was inſiſted, being only granted, when in the hands of ſequeſtrators, and therefore *irregular*.

Lord Chancellor.—I am clearly of opinion with his Honour, that this Court will order a perſon to come in and be examined *pro intereſſe ſuo*, as well againſt a receiver appointed by this Court, as againſt ſequeſtrators.

Ex

Ex parte *Cheveley*. 3 Nov. 1772.

MR. *Perrin* on behalf of one *Cheveley*, prayed to ſuperſede a writ *de excommunicato capiendo*.

The Court refuſed to interfere, but ordered *Cheveley* to pay the coſts of the application, to be taxed.

Birt v. *White*. 10 Dec. 1772. Lord Bathurſt C.

A WITNESS going to the *Weſt Indies*, an order was obtained to examine him; and he was accordingly examined: application was made to publiſh his depoſition; but it being known that he was in *Ireland*, and publication not having paſſed, it was refuſed; it being held he muſt be examined in chief.

Bacon v. *Griffith*. 14 Dec. 1772.

(Reg. Lib. A. fol. 40.)

THE defendant put in his anſwer to the original bill; afterwards the plaintiff obtained an order to amend his bill, and accordingly amended it.

The defendant obtained an order, for time to anſwer the amendments; but not anſwering, and being in contempt to a ſequeſtration for not anſwering the amendments, the plaintiff applied this day to Sir *Thomas Sewel* M. R. by motion, for the Clerk in Court to attend with the record, to take the bill *pro confeſſo* againſt the defendant as to the matter of the amendment;

Bacon v. *Griffith.*

ment: The defendant objected the irregularity, and argued on the abſurdity of doing ſo.

But his Honour was clear, that there was no abſurdity, and that it would be abſurd not to do it; and therefore ordered the Clerk in Court to attend with the record. *Hawkins* v. *Crook*, 2 *P. Wms.* 556, was cited.

The plaintiff moved this day, to diſcharge the order: Mr. *Perrin* for the defendant; Mr. *Madocks* for the plaintiff; and Lord *Bathurſt* C. held the ſame to be improper; the original and amended bill, being but one record (*a*).

(*a*) Qu. If the plaintiff be not left remedileſs. J. D.

16 Jan. 1773. Lord Bathurſt C.

Ceal v. *Aſhurſt.*

ON hearing the cauſe, it was referred to a Maſter to ſettle a caſe, for the opinion of the Judges of the Court of King's Bench, grounded on references of the like kind, in Lord *Nottingham*'s time, mentioned in *Finch's Reports.*

23 Jan. 1773.

Sumpter v. *Life.*

There is no way of getting rid of an award in this Court, but by bill.

MATTERS in difference had been referred to arbitrators; they made their award: the defendant this day moved, that the Accountant General might, purſuant to the award made under arbitration bonds, transfer ſome funds ſtanding in his name to the defendant.

The plaintiff oppoſed the motion, and objected to the conduct of the arbitrators.

Lord

Sumpter v. *Life.*

Lord *Bathurſt* C.—In Courts of law, where an award is made a rule of Court, the practice is, to ſue out an attachment againſt the party, to enforce the execution; thereby putting him upon impeaching the award, if he think fit.

Here there is no other way to impeach the award, but by bill (*a*). Therefore take nothing by the motion.

(*a*) See Spettigue v. Carpenter. ſupr.

Codrington v. Earl of *Shelburne.*

25 Jan. 1773.

A FEME covert being the heir at law of the teſtator, and living ſeparate, and anſwering ſeparately from her huſband, in purſuance of an order for that purpoſe; her admiſſion of the will was held by Lord *Bathurſt* C. ſufficient ground for the Court to eſtabliſh it.

Hilliard v. *Taylor.*

8 Feb. 1773. Ambl. 713. S. C.

THE cauſe was heard before Sir *Thomas Clarke* M. R., and his Honour marſhalled the aſſets, ſo as to preſerve the perſonal eſtate, to ſatisfy the charity.

Decree of the Maſter of the Rolls directing aſſets to be marſhalled, in order to let in a bequeſt to a charity, reverſed by the Lord Chancellor.

It came on an appeal to the Lord Chancellor from the decree; and ſtood this day for judgment.

Lord *Bathurſt* C.—All hath been ſaid, which can be ſaid, on behalf of the charity.

The

Hilliard v. Taylor.

The queſtion is, whether marſhalling of aſſets ſhall be let in, for the purpoſe of anſwering a charity.

I muſt be governed by precedents: In *Mogg* v. *Hodges*, 2 *Veſey*, 52; in the Attorney General v. *Forſter*, 25 *June* 1766; in *Soreſby* v. *Hollins*, 2 *Burn's Eccl. Law*, 508, the charity was thrown on the perſonal eſtate.

In *Dalton* v. *James*, decided by Lord *Hardwicke*, 5 *February* 1745, the teſtator deviſed his real eſtate, to pay debts and legacies, if the perſonal eſtate was not ſufficient; and gave 1000*l.* to a charity: the perſonal eſtate turning out not to be ſufficient to pay the whole, the aſſets were marſhalled for the charity.

In *Gaſtrèl* v. *Baker*, 30 *March* 1747, determined by Lord Chancellor *Hardwicke*; in *Vaughan* v. *Purrier*, 26 *February* 1750; in Attorney General v. *Graves*, *Nov.* 1752 (*a*); and in Attorney General v. Bethlem Hoſpital, cited in it; Lord *Hardwicke* as to the marſhalling of aſſets, was clear the old way of marſhalling aſſets was to let in the legatee for ſatisfaction, out of a fund only applicable to the payment of his legacy, and to throw the other legacies on the other fund.

(*a*) Ambl. 155.

In the Attorney General v. *Tomkin*, 4th *March*, 1754 (*b*), and in the Attorney General v. *Tindale*, 10th of *Nov.* 1759 (*c*), aſſets were marſhalled to let in a charity: The decree was reverſed by Lord *Northington* 6th *March* 1764. *Forſter* v. *Blagden*, 12th and 13th *Nov.* 1771 (*d*), decided by Lord Chief Baron *Smith*, ſitting as one of the Lords Commiſſioners of the Great Seal, is in point: The plaintiff, the executor and truſtee in the will, in that caſe brought his bill, in the nature of an interpleading bill, againſt the heir at law, and other charity legatees, for direction how to act; the Court would not marſhal.

(*b*) Ambl. 216.

(*c*) Ambl. 614.

(*d*) Ambl. 704.

If

If the marſhalling of aſſets to let in charity, were to be tolerated, the Court would be doing that *per obliquum*, which it would not do *per directum*. *Arnold* v. *Chapman*, 1 *Veſey*, 108. *Hilliard* v. *Taylor*.

Therefore let the decree, ſo far as it marſhals the aſſets, be reverſed.

Williams v. *Johns*.

12 Feb. 1773. Lord Bathurſt C.

THIS was an application without notice, to commit the defendant for a contempt, in making the perſon, who ſerved him with a ſubpœna to appear and anſwer, eat the ſame, and otherwiſe ill treating him; the defendant ordered to ſtand committed, unleſs cauſe; but by reaſon of his ferocious, and terrible diſpoſition, no one being willing to hazard ſerving him, leaving the order at his houſe, was to be deemed good ſervice.

Wilſon v. *Wombwell* and *Nottingham*.

23 Feb. 1773.

THE queſtion in this caſe was, whether the next of kin, or the executors, were entitled to the reſidue the perſonal eſtate, undiſpoſed of.

Lord *Bathurſt* C.—The queſtion is, whether the executors are to take by the expreſs words of the will; or take the reſidue by operation of law.

I take it to be law, that after ſatisfying debts, and legacies, if nothing is given to the executors, and no apparent

Wilson v. *Wombwell* et al.

apparent intention to the contrary, the reſidue will belong to them.

In the preſent caſe, it is evident nothing was intended for the executors, but what they had.

Therefore his Lordſhip directed the account of the perſonal eſtate; and declared the clear reſidue to belong to the next of kin; and to be divided accordingly.

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1 March 1773.

Rugg v. *Floyer.*

SERVICE on the Clerk in Court on the defendant, with a notice of motion, that he might ſtand committed, for breach of an injunction; ordered to be deemed good ſervice.

Calvert v. *Adams.*

(Reg. Lib. A. fol. 136.)

A RECEIVER appointed of two fifths of an eſtate.

[But in *Willoughby* v. *Willoughby*, Lord *Northington* C. refuſed to appoint a receiver of an undivided moiety, putting this queſtion: how could a receiver let, ſet, or diſtrain, or take any ſtep without the conſent of the other co-parcener? J. D.]

Ex

Ex parte *Cole*.

15 March 1773.

A priſoner committed by commiſſioners of bankrupt for not anſwering a queſtion relative to the bankrupt's eſtate, brought up by *habeas corpus*, and remanded until he would anſwer.

Thomas Miller having been committed by a warrant of commiſſioners of bankrupt, for not anſwering queſtions put to him, relative to the bankrupt's eſtate, under the ſtatute of the 5th of *Geo.* 2. *ſ.* 18. is brought up by *habeas corpus*, according to which the Court cannot bail, but muſt diſcharge, or remand the priſoner.

The counſel for the defendant alleged, they had various objections to the warrant of commitment; and therefore prayed, the priſoner might be diſcharged.

Lord *Bathurſt* C.—This is a queſtion, whether the warrant is ſufficient for me to remand the priſoner.

The ſtatute of the 5th of *Geo.* 2. has taken care, that the warrant ſhall not be quaſhed for want of form; but here is a defect in point of form.

It is objected, that the commiſſioners did not qualify, but that is not to be preſumed: It is alſo objected, that the queſtion put is not relative to the bankrupt's eſtate; on the contrary, I think the queſtion put is clearly pointed, and relative to the bankrupt's eſtate; and the ſummons is for his appearing, and anſwering queſtions relative to the eſtate of the bankrupt, and he will not anſwer; therefore let the priſoner be remanded.

Bromfield

27 Feb. and 2 & 3 March 1773. Ambl. 715. S.C.

Bromfield v. *Chicheſter.*
Raw v. *Duthelly.*

Lord *Bathurſt* C.

On a queſtion as to leaſes renewed by an executrix after the term had expired, whether for her own benefit, or for the benefit of the eſtate of the teſtator, and a ſecret truſt to her executors, they were declared to reſult for the next of kin.

Richard Raw, the huſband of *Frances Raw*, being poſſeſſed of and entitled to certain eſtates in *Cornwall*, held by leaſe from the Crown, of which thirty-one years were then come, and which would expire at *Lady day* 1747, made his will dated the 29th day of *December* 1716, and thereby bequeathed the leaſes to *Frances* his wife, during ſo many years of the terms granted in and by the ſaid ſeveral leaſes, as ſhe ſhould live, and after the death of his wife, if the terms granted by the ſaid leaſes, ſhould then exiſt, he gives the ſame to his brother *William Raw*, for ſo many years of the term granted by the ſaid leaſes, as he ſhould live; and after the death of *William Raw*, if the terms exiſted, he gives the ſame to ſuch of the children of *William Raw*, as ſhould be living at the time of his death, and after giving legacies, he gives the reſidue of his eſtates to his wife the ſaid *Frances Raw*, and appoints her executrix.

In 1718, the teſtator died.

On 7th of *February* 1719, *Frances Raw*, applied for, and obtained a leaſe of a ſpot of ground called *Collier's Yard*, as executrix of *Richard Raw*, contiguous to and incloſed in the part of the leaſehold premiſes granted to her huſband, and which ought to have been held by her huſband, but in fact was not, and to commence from the 7th of *February* 1719, to the 25th of *March* 1747, to make it concurrent with the other leaſes.

On the 6th *April* 1734, ſhe applied for a renewal of the leaſe of *Collier's Yard*, as well as the other eſtates, and obtained a grant of both in her own name, ſo as to make up the term thirty-one years, and paid a fine of 1000 *l.* the rent reſerved, being 16 *l.* 10 *s.* 9 *d.* for *Prince's Meadow*; for *Collier's Yard* 2 *l.*

On 22d *June* 1749, ſhe obtained a grant for an additional term of fifteen years, to expire at *Lady-Day* 1767; the fine ſhe paid was 900 *l*; the ſame rent was reſerved.

Theſe leaſes recited the title of *Frances*, under the will of her huſband.

She afterwards granted leaſes, and took fines; in which leaſes, *William Raw*, and *Urſula Raw*, deviſees in remainder of the ſaid eſtates in the will of the teſtator *Richard Raw*, after the death of *Frances*, the widow, joined.

On the 18th of *October* 1760, *Frances* being then turned of eighty years, and of weak mind, and a great bigot in her religion, being a papiſt, was prevailed upon by one *Pointz* a jeſuit, to execute a will prepared by him, and which he carried down to her, whereby after giving ſome legacies, ſhe gave the reſidue to the defendants, *Chicheſter* and *Hutton*, the executors named in the will, (whom ſhe had never ſeen), upon ſuch truſt, and for ſuch uſes as they knew; and they poſſeſſed her eſtate, and *Pointz*, who had procured her to appoint him the receiver of her eſtates, was permitted to continue in the receipt, but he never accounted.

Upon this caſe, the plaintiffs in the firſt cauſe, the deviſees in remainder, under the will of the teſtator

Bromfield v. Chicheſter. Raw v. Duthelly.

Richard Raw upon the death of the ſaid *Frances* the widow, and who claim the leaſehold eſtates deviſed by the will of *Richard Raw*, have exhibited their bill to have an account of the rents and profits of theſe eſtates, accrued ſince the death of *Frances*.

The defendants in the ſecond cauſe claim the ſaid eſtate, as part of the eſtates of *Frances* the widow, they being her next of kin; and have filed their bill againſt the executors, amongſt other things, for an account of her eſtates, charging, that ſhe had deviſed to her executors only a legal eſtate, and had not diſpoſed of the equitable intereſt; and by their bill particularly prayed, a diſcovery of the truſt for which the eſtate was given to them.

The defendants pleaded to the diſcovery, but their plea was overruled.

They were at length after three or four inſufficient anſwers, driven to admit, that they did not claim any beneficial intereſt in the teſtatrix's eſtate; and that the truſt repoſed in them, was a ſecret truſt, now known to have been the College of Jeſuits at *St. Omers*.

The queſtions in the cauſes, principally are, whether *Frances* the widow, had a power to deviſe the leaſehold eſtates?

It was argued, that being a papiſt, nothing could veſt in her beneficially, but only as executrix; but ſuppoſing ſhe had a power to deviſe, then a queſtion ariſes, whether ſhe hath deviſed?

But the primary queſtion is, whether the renewed leaſes are the eſtate of *Richard Raw*, or of *Frances* his widow?

Let

Let us ſee whether this comes within the general rule, that old leaſes pervade renewed leaſes, and are conſidered as in the nature and quality of the old leaſes, and ſubject to the ſame terms and conditions as the old leaſes; or whether there is any particular reaſon, to take this caſe out of that general rule; and I am of opinion there is not. Her application was as executrix of *Richard Raw*, and though the leaſes are granted in her name, yet in the reciting part, they take notice of her being executrix. *Bromfield* v. *Chicheſter. Raw* v. *Duthelly.*

Upon the general rule I before mentioned, the caſes are numerous: *Cook* v. *Duckenfield* (*a*); *Adlington* v. *Cann*, 14 *May* 1743 (*b*), both decided by Lord *Hardwicke*. *Holt* v. *Holt*, 1 *Chan. Caſ.* 190; *Luckin* v. *Ruſhworth*, *Finch's Reports* 392, (*c*); *Patnur* v. *Young*, 1 *Vern.* 276; *Walley* v. *Walley*, 1 *Vern.* 484; *Witter* v. *Witter*, 3 *P. Wms.* 99; *Maſon* v. *Day* (*d*); *Norton* v. *Crop*, 2 *Atkins*, 74; *Verney* v. *Verney*, 1 *Veſey*, 428; *Hall* v. *Veal*, before Lord *Camden*.

(*a*) 2 Atk. 562.
(*b*) 3 Atk. 141.
(*c*) 2 Ch. Ca. 113. S. C.
(*d*) 2 Eq. Ca. Abr. 494.

Therefore declare, that that the renewal of the leaſes of the eſtates in queſtion, except *Collier's Yard* eſtate, of which *Frances* obtained an original leaſe, and which is to be conſidered as part of her eſtate, are to be conſidered as renewed for the benefit of the eſtate of the teſtator *Richard Raw*, and to go according to his will; and the eſtate of *Frances* muſt have an allowance, for what ſhe paid for fines, &c. on renewal; and an account muſt be taken of what ſhe received for fines and rents from under leſſees; and as to the reſidue of the eſtate of the teſtatrix *Frances*

Bromfield v. Chichester. Rawe v. Duthelly.

Rowe, declare *Chichester* and *Hutton* the executors, and to be considered only as truſtees; and that the beneficial intereſt in ſuch reſidue reſults for the benefit of the next of kin of the ſaid teſtatrix.

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20 May 1773. At Weſtminſter, in Petty Bag, before Lord Bathurſt C.

Mitford v. *Lark.*

ON motion by Mr. *Stainſby*, on behalf of the defendant, that his bail might juſtify, after being ſworn, and examined; his Lordſhip allowed of one, and diſapproved the other.

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20 May 1773.

Fell v. *Chamberlain.*

Bill retained in order that the plaintiff might indict the defendant for perjury.

THE bill was for an injunction, to ſtay proceedings at law for a breach of covenant, in not aſſigning and delivering *all* the premiſes, which the defendant inſiſted, by an agreement in writing, and a leaſe in purſuance of it, were to be aſſigned; the plaintiff ſtates by his bill, that though the agreement was for *all* the premiſes, yet the defendant, at the time of the execution of the leaſe, to prevent delay, and to ſave the trouble and expence of a new leaſe, agreed, that three pieces of land ſhould be excepted; but the defendant by his anſwer, denying the fact, and inſiſting on the extent of the written agreement, the plaintiff examined ſeveral witneſſes to prove the fact; which they did; but their evidence being objected to at the hearing, they were not admitted to be read; his Lordſhip, however, retained

retained the bill for twelve months, with liberty for the plaintiff to prefer a bill of indictment for perjury againſt the defendant, if ſo adviſed. *Fell* v. *Chamberlain.*

Peirce v. *Watkin.*

24 May 1773.

APPLICATION to Sir *Thomas Sewel* M. R. that the Regiſter of the Epiſcopal and Conſiſtory Court of *Hereford*, might deliver an original will to the plaintiff's ſolicitor, to be produced at the hearing of the cauſe; the cauſe ſtood twelve out of the paper; ordered, upon giving ſecurity to return the will in ſix weeks from the delivery (*a*).

(*a*) On a ſimilar application in Williams v. Floyer, 16 July 1757, there was a ſimilar order. Vid. Moore v. Roach, ſupr.

Kingſcote v. *Bainſly.*

8 June 1773. Lord Bathurſt C.

LIBERTY given to the defendant to amend his anſwer, by ſtriking out the admiſſion of the plaintiff's pedigree, after publication.

Fawel v. *Healis.*

14 June 1773. Ambl. 724. S.C.

THIS cauſe ſtood for judgment this day.

Lord *Bathurſt* C.—The queſtion in this cauſe aroſe on the ſale of an eſtate; the vendor at the time of the conveyance, took the purchaſer's bond for the

If the vendor of an eſtate take the purchaſer's bond as a ſecurity for the purchaſe money, and the purchaſer becomes inſolvent, the vendor hath no lien on the eſtate for the conſideration money, but muſt abide by his ſecurity.

Fewel v. Heelis.

money: before it was paid, the purchaſer became inſolvent, and a bankrupt.

The queſtion is, whether the purchaſer hath a lien on the eſtate for the conſideration money?

It hath been laid down as a general principle, that a vendor hath a ſpecific lien on the eſtate; that the ſame equity lies againſt truſtees, as againſt the principal.

In order to prove this point, three caſes have been cited. *Chapman* v. *Tanner*, 1 *Vern.* 267, which as cited is certainly a very ſtrong caſe, but upon looking into the Regiſter's book, it is very different.

Pollexfen v. *Moore*, 3 *Atkins* 272, is very inaccurate; therefore I had recourſe to the Regiſter's book for it.

And *Fordiffe* v. *Schrugam*, 8 *December* 1769, *Reg. Lib. B. fol.* 453.

I do not find an inſtance where a bond has been taken for the conſideration money. It is evident he had an opinion of the purchaſer at the time, otherwiſe he would not have let the money remain in his hands: I conſider it as a tranſaction diſtinct, and independent of the purchaſe: he lends him the money, and he chuſes his ſecurity, and I think he muſt abide by it; therefore let the bill be diſmiſſed.

Rucker

Rucker v. *Hagen.*

21 June 1773.
Ambl. 672. S C.

A surety having paid the money for which he was bound, after a commiſſion of bankruptcy had iſſued againſt the principal, held not to be barred of his demand againſt the bankrupt, by the commiſſion, and certificate.

THIS cauſe ſtood this day for judgment.

Lord *Bathurſt* C.—The bill is brought by the plaintiff *Rucher*, againſt the executors of *Hagen*, to recover what is due to him, on eight notes for 400 *l.* each, payable at different times.

The caſe is this: In 1766, *Hagen* applied to *Baker*, to borrow 10,000 *l.* Reduced Bank annuities; which *Baker* lent, and *Hagen* gave his note, to re-transfer it on a month's notice.

The plaintiff *Rucker*, binds himſelf to *Baker* by bond, as a collateral ſecurity.

Baker received from *Hagen*, one half year's intereſt of the annuities; but before he demanded of *Hagen* to re-transfer the annuities, *Hagen* became a bankrupt, and a commiſſion iſſued againſt him, and he was found a bankrupt, and *Baker proved his debt*, and in *April* there was half a year's intereſt due on the annuities: The plaintiff *Rucker* paid 150 *l.* for ſuch intereſt, and continued to pay two or three more half years' intereſt, and then pays to *Baker* the reſidue of the money, and takes up from *Baker* the notes given to him by *Hagen*.

Hagen obtains his certificate, and afterwards dies having made his will, and the defendants his executors, who proved the will, and poſſeſſed his effects.

The queſtion in the cauſe is, whether the plaintiff be, or be not entitled to come in upon the effects of *Hagen* for payment of the notes.

Rucker v. *Hagen.*

Two objections are made to such claim: *First*, It is said, that the debt is discharged by the commission of bankruptcy, and the certificate; and being so discharged, *secondly*, That the notes under which the plaintiff claimed, were a debt proveable under the commission, and the engagement, and payment by the plaintiff being voluntary, he is not entitled to come in upon the effects of *Hagen*.

It is a general rule, if a debt can be proved under a commission of bankruptcy, it is discharged by the certificate.

If it is such a debt as cannot be proved, it is a subsequent debt.

What is this debt?

The plaintiff had no demand at the time of the commission of bankruptcy, because he had not been called upon as a collateral security, until after the commission. See Ex parte *Marshal*, 1 *Atkins*, 131.

I am therefore of opinion, that the plaintiff *Rucker*'s demand, was not a debt until after the commission, and consequently could not be proved under the commission: therefore let an account be taken of what is due to the plaintiff, and let him be paid out of the assets of *Hagen*.

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15 July 1773.

Manly v. *Hammet.*

Injunction granted before the right was established at

BILL for an injunction, and to stay the defendant from pulling down the walls, on which the timbers of the plaintiff's warehouses were placed.

The plaintiff obtained an injunction.

On

Manly v. Hammet.

On the hearing of the cauſe, the bill was retained with liberty for the plaintiff to bring an action of treſpaſs againſt the defendant, for pulling down the walls: It was prayed to continue the injunction, which the Court did; to which it was objected, that the plaintiff ought firſt to prove his right.

Buſh v. *Weſton*, *Prec. in Chan.* 530; Mayor of *York* v. *Pilkington*, 1 *Atkins*, 282, were cited, to ſhew this Court will grant an injunction, before the right is eſtabliſhed at law.

Palmer v. *Mure.*

23 July 1773.

Queſtion reſpecting a double plea to diſcovery and relief, againſt a decree, and account taken in another Court.

THIS bill was a general account, and production *for fraud*, and for a diſcovery.

Plea to both relief, and diſcovery.

Sir *Thomas Sewel* M. R.—This comes before the Court upon a double plea as to relief, and diſcovery after a decree, and an account taken in another Court.

This is not a caſe of juriſdiction, or a competition between two Courts.

The charge by the bill of fraud, too general.

A bill to have a general account, for ſo general an act *of fraud*, to me ſeems improper: It ought only to have been to correct any thing that had paſſed unſettled through fraud.

This is not like the caſe of *Foſter* v. *Vaſſel*, 3 *Atk.* 587. We muſt take the facts, as ſtated in the bill, and anſwer, and plea, to be true.

The

Palmer v. *Mure.*

The bill, by praying general account, prays too much: It ought to have been, to correct any errors, and to falſify any charge.

The bill alſo prays a diſcovery of what hath been ſuppreſſed.

The plea to the diſcovery, I think not good.

The bill is alſo to be relieved againſt fraud, to which a plaintiff is in all caſes entitled, if he makes it out: But then the charge of fraud muſt be pointed, and not a general charge.

Where a bill charges fraud, by the ſuppreſſion of any fact in the ſurcharging of the defendant, which ought to have been diſcovered; the defendant ought to anſwer particularly to the fact, either to admit, or to deny it; and therefore I think the plea as to the diſcovery bad, and that it ought to be overruled.

As to the relief, if the caſe be made out, the plaintiff will in my opinion be entitled to relief; it is not new to pray relief by an original bill, againſt a decree and an account taken in a former cauſe.

There are many caſes upon that head: *Abbot* v. *Green*, before Lord *Hardwicke*, decree ſet aſide by original bill: *Shelden* v. *Forteſcue*, 3 *P. Wms.* 104, decree ſet aſide by original bill: *Kent* v. *Bridgman* (*a*), after trial at law; *Robinſon* v. *Bell*, 2 *Vern.* 146, after a verdict; *Humphreys* v. *Humphreys*, 3 *P. Wms.* 395; *Blackhall* v. *Combe*, 2 *P. Wms.* 70; *Lloyd* v. *Manſell*, 2 *P. Wms.* 73, ſet aſide by original bill; Counteſs of *Gainſborough* v. *Gifford*, 2 *P. Wms.* 424.

(*a*) Prec. Ch. 833.

Lord *Bathurſt* C.—I ought to apologize for keeping the matter ſo long before the Court: At firſt I differed in opinion with his Honour, but he hath now convinced me, and I entirely concede to his

his Honour's opinion, and am firſt to thank him for the great pains he hath taken upon the occaſion. *Palmer* v. *Mure.*

The prayer of the bill is too large, but there is no reaſon why he ſhould not have ſome relief.

In the caſe of *Wells* v. Lord *Ambroſe*, 16th *December* 1747, the defendant pleaded a bill in the Exchequer of *Ireland*, touching the ſame matters; the plea was held good, but the Lord Chancellor nevertheleſs reſerved a power to give liberty for the plaintiff to proceed in this Court, if ſo adviſed.

As to the diſcovery, I think with his Honour, that the plaintiff is entitled to it: therefore let the plea as to the diſcovery be overruled.

And as to the relief, let the plea ſtand for an anſwer, with liberty for the plaintiff to except, and ſave the benefit to the hearing: By the rule of the Court, the exceptions can be put in only two Terms before the plea is argued; the two Terms are expired, and therefore unleſs the words, liberty to except be added, the plaintiff cannot except.

The caſe of *Snell* v. *Lewis*, by Lord *Talbot*, was cited upon the laſt head.

Gayner v. *Wilkinſon.*

15 & 19 Nov. 1773.

Huſband a bankrupt: a contingent legacy to the wife veſted, but not reduced into poſſeſſion, the huſband being dead, held not to veſt in his aſſignees.

THE bill was filed by the aſſignees of *Andrew Pearſon* a bankrupt, to be paid a contingent legacy to the wife, by the will of *Robert Smith*; the huſband being dead, before it was reduced into poſſeſſion, on the following caſe:

Robert Smith by his will, gave 2000 *l.* to the defendant *Wilkinſon* in truſt, to pay the intereſt to his nephew *James*

Gayner v. *Wilkinſon.*

James Atlee during his life, and from his deceaſe in truſt for the uſe and benefit of *James*'s children *Urſula*, *Mary*, *Elizabeth* and *James*, when they ſhould reſpectively attain twenty-one, or marry; and if any of them ſhould die before their ſhares became payable, the ſame to go to the ſurvivors, and be payable as their original ſhares.

Urſula and *James* died in the life-time of the teſtator, leaving *Mary* and *Elizabeth* their ſiſters them ſurviving.

Mary intermarried with *Andrew Pearſon*; he became a bankrupt in 1768, and his eſtate and effects were aſſigned to the plaintiffs his aſſignees.

Elizabeth married *John Atlee*, who died never having reduced the legacy into poſſeſſion, and afterwards *Elizabeth* died, and *Mary Pearſon* became her adminiſtratrix.

James Atlee the father died, and ſoon after, the ſaid *Andrew Pearſon* the bankrupt died.

The plaintiffs as the aſſignees of the ſaid *Andrew Pearſon*, claimed the legacy, and the queſtion was, whether the contingent legacy of 2000 *l.* given to the wife, not reduced into poſſeſſion, ſhould go to the aſſignees of the huſband, who died before it was reduced into poſſeſſion.

(*a*) 19 Nov. 1773.

The cauſe ſtood over for judgment to this day (*a*).

Lord *Bathurſt* C. after ſtating the caſe, and facts as before cited, proceeded thus:

The aſſignees claim the whole 2000 *l.* as having veſted in *Mary Pearſon* the wife of the bankrupt; and inſiſt, that as aſſignees, they are entitled to have a transfer of the whole.

It is given up, that *John Atlee* was entitled to a moiety of it.

At firſt it was given up, that the plaintiffs the aſſignees were entitled, and ſtood over, for the parties to agree to make an allowance to the widow.

I have not heard any caſe, where the queſtion hath been between the aſſignees of a bankrupt, and the wife after the bankrupt's death.

The caſe of *Wenman* v. *Maſon*, before Lord *Northington*, is not in point.

I ſhall conſider this queſtion upon the principles of law, and on thoſe which prevail in this Court.

Whatever a bankrupt can releaſe, or diſpoſe of, is in the aſſignment from the Commiſſioners.

In *Miles* v. *Williams*, 1 *P. Wms.* 249, a bond executed to the wife *dum ſola*, was held aſſignable by the Commiſſioners for two reaſons; one that the huſband might aſſign; the other that he might releaſe it to the King, to bring it within the ſtatute.

So in the caſe of *Boſwell* v. *Brandon*, 1 *P. Wms.* 558. The ſame point was determined in *Baker* v. *Dandy*, by Lord *Hardwicke* C. on the authority of *Boſwell* v. *Brandon*, ſtated in 2 *Atkins*, 207. The caſe of Lord *Carteret* v. *Paſcal*, 3 *P. Wms.* 197, is to the ſame purpoſe.

In the caſe of *Carteret* v. *Paſcal*, it muſt be noticed, that the wife was dead; had the wife been living, it might have been determined otherwiſe.

There is a difference between an aſſignee for a conſideration, and the aſſignees of a bankrupt: becauſe a general aſſignee muſt ſue in his own name; a particular aſſignee muſt bring an action in the name of the huſband.

Therefore

Gaynor v. *Wilkinſon.*

Therefore if the huſband dies before it is recovered, the aſſignee for a valuable conſideration, will loſe all legal remedy, and muſt come into this Court for it's aſſiſtance.

Particular aſſignments have been ſometimes ſupported, but not generally: This Court will not ſtrip a widow, and children.

But be that as it may, in this caſe, the intereſt of the wife, was not ſuch a legal intereſt as the huſband could aſſign: he muſt have come into this Court. *Watſon* v. *Marſhall*, 19th *March* 1732, at the Rolls, 2 *Vern.* 270: That caſe is not like this. In the caſe of *Wenman* v. *Maſon*, 18th *June* 1765, before Lord *Northington* C., the huſband and wife aſſigned over a legacy given to the wife, to different perſons; the wife joined in the aſſignments. The bill was brought by the aſſignees merely as to priority. Not thinking of any doubt as to their intereſt, the huſband and wife anſwered jointly. In *December* 1765, the cauſe came on again, when the wife was examined. On the 29th *January* 1768, the cauſe came on again, when the aſſignees agreed to allow her 300 *l.* *Grey* v. *Kentiſh*, as ſtated in 1 *Atkins*, 280, is errant nonſenſe: It muſt be read, as corrected by the Regiſter's book, 21 *July* 1743, fol. 522.

Therefore let this bill be diſmiſſed with coſts.

Tate

Tate v. *Belland.*

12 Feb. 1774.

A plaintiff cannot ſet down a cauſe until after publication is paſſed, unleſs it be enlarged at the inſtance of the defendant, and ſo as not to hinder the plaintiff's ſetting down the cauſe.

APPLICATION was this day made to ſtrike the cauſe out of the paper, or to diſcharge the order for enlarging publication, and to ſuppreſs the depoſitions, upon this ground: that by the rules and courſe of the Court, as was ſaid, a plaintiff cannot enlarge publication, and examine witneſſes, after he has ſet down his cauſe.

Sir *Thomas Sewel* M. R.—I am clear a plaintiff cannot ſet down his cauſe for hearing, until after publication is paſſed, unleſs publication is enlarged at the inſtance of the defendant, with the proviſo, ſo as not to prevent the plaintiff from ſetting down the cauſe: If publication is paſſed, the plaintiff may ſet down the cauſe; and if no witneſſes have been examined, the plaintiff may afterwards enlarge publication, and examine witneſſes: This was the caſe in the preſent inſtance; and therefore take nothing by the motion.

Hite v. *Salter.*

Hil. 1774. 7 Bro. P. C. 1. 208. S. C.

ON hearing the cauſe, an iſſue *deviſavit vel non*, was directed to be tried at the aſſizes: application by the plaintiff, to have it tried at the bar of the Court of King's Bench: which was ordered, upon the plaintiff's agreeing to accept *niſi prius* coſts, in caſe a verdict ſhould be found in his favour.

Pigot

1 March 1774.

Pigot v. *Stace.*

Where a bill is for a diſcovery, and relief, and the defendant anſwers to the relief, and pleads to the diſcovery, it is not neceſſary the plea ſhould be argued, before the plaintiff can except to the anſwer.

THE bill was brought for an injunction, and a diſcovery: the defendant pleaded to the relief, and anſwered as to the diſcovery: the plaintiff took exceptions to the anſwer, and obtained an order to refer the exceptions: the defendant on the above day, applied to diſcharge the order, to refer the exceptions for irregularity, inſiſting that according to the conſtant courſe of the Court, the plea ſhould have been argued, before the plaintiff had taken exceptions.

Sir *Thomas Sewel* M. R. ſaid he would go upon the reaſon of the thing, and put this queſtion, could not the plaintiff have allowed the plea, and put the defendant upon the proof of it, by replying? That cannot be denied: the plea and anſwer therefore are diſtinct; and he held it not neceſſary, where the bill is for a diſcovery and relief, and a plea is put in to the relief, that the plea ſhould be ſet down to be argued, before the plaintiff can refer the anſwer for inſufficiency. His Honour cited The London Aſſurance Company v. Eaſt India Company, 3 *P. Wms.* 326, 17 *Dec.* 1754, before Lord *Hardwicke*, bill for relief and diſcovery: plea to the whole, allowed as to the relief, overruled as to the diſcovery; and cited alſo *Turner* v. *Mitchell*, 9th *February* 1754, determined by Lord *Hardwicke* C., where on a bill for an account of real, and perſonal eſtate, there was a plea to the whole, which was overruled ſo far as it related to the perſonal eſtate, but allowed as to the real eſtate.

Sumpter

Sumpter v. *Life.*

9 March 1774.

BILL to ſet aſide the award (*a*), in this caſe.

Lord *Bathurſt* C.—There is no inſtance of ſetting aſide an award, except on the grounds of partiality and miſbehaviour, or for that the arbitrators have exceeded their commiſſion.

(*a*) Vid. ſupr. Award not to be ſet aſide but for partiality, and miſbehaviour of the arbitrators, or for their exceeding their commiſſion.

The queſtion here is, whether the arbitrators have miſbehaved. I am clear they have not. The only ground for relief againſt the award is, for that the arbitrators have allowed 250*l.* for coſts: The matter being before them, who can be ſo proper judges of the coſts?

Therefore let the bill be diſmiſſed.

Goodwin v. *Clarke.*

(Reg. Lib. A. fol. 289.)

8 March 1774.

BILL to have a ſpecific performance of an agreement, and that the defendant might pay 1900*l.* the remainder of the purchaſe money; 100*l.* having been paid; the defendant threatening to go abroad, a writ of *ne exeat regno* was granted, to be marked in the ſum of 300*l.* (*b*).

(*b*) *Qu.* Why that ſum? J. D.

[The above caſe was cited by Mr. *Selwyn*, the 21ſt of *June* 1784, *Anon.* on an application to Lord *Thurlow* C. for a *ne exeat regno* on the like grounds; his Lordſhip put this queſtion, how doth it appear, that the plaintiff can make a title? And although he go, abroad *non conſtat*, he hath not property here; and in what ſum am I to order the writ to be indorſed? Therefore take nothing by the motion. J. D.]

24 Jan. 1774. Lord Bathurſt C.

Yeo v. *Yeo.*

BILL by a wife againſt her huſband, for a ſpecific performance of articles, and for alimony; ſhe by his cruel treatment, being obliged to leave him: application that he might pay her 1000*l.* for her ſupport, and to carry on the ſuit: 500*l.* were ordered to be paid to her in a month, for the purpoſe of carrying on the ſuit, without prejudice.

29 April 1774.

Yarroway v. *Hand.*

AT the hearing, the cauſe went off for want of parties, with liberty for the plaintiff to amend; neglecting to amend, he was ordered to do ſo by a given time, or the bill to be diſmiſſed.

2 May 1774.

Hancom v. *Allen.*

If a truſtee lay out truſt money in a fund which the Court does not adopt, and ſuch fund afterwards ſinks in its value, this Court though there were no *mala fides* will throw the loſs upon the truſtee; otherwiſe if laid out in the fund which the Court adopts.

THE bill was to have ſome truſt money laid out purſuant to the truſts of a deed bearing date 1740: The truſt money had been laid out by the truſtees in funds, which ſunk in their value, without any *mala fides*; but the ſame not being laid

out

out in the fund in which the Court directs truſt money to be laid out, the truſtees were ordered to account for the principal, and to pay it into the Bank, and then that it ſhould be laid out in Bank three *per cent.* annuities. *Hancom* v. *Allen*

The following caſe was cited, *Trafford* v. *Boehm*, before Lord *Hardwicke* C. (*a*) where a truſtee laid out truſt money in the South Sea annuities, which afterwards ſunk in their value; it was conſidered as a departure from the truſt, and the truſtee ordered perſonally to make good the deficiency to the truſt eſtate.

(*a*) 3 Atk. 440.

[In *Adie* v. *Fennilitteau*, by the Lords Commiſſioners Lord *Loughborough*, *Aſhhurſt*, and *Hotham*, in *April* 1783, a truſtee laid out truſt money in South Sea annuities; they afterwards fell in their price, and though it was in the ſame fund, *in which the greateſt part of the teſtator's perſonal eſtate was at his death inveſted*, their Lordſhips held it to be an improper inveſtment; and that the truſtee ſhould abide the loſs.

In Peat v. *Crane*, before Lord *Thurlow* C. the truſtee laid out truſt money, in Bank three *per cent.* conſolidated annuites, the fund the Court adopts (with a view to benefit the truſt, ſo that it might not lie unproductive), the ſaid annuities afterwards ſunk in their price, the truſtee claimed an allowance for what he had ſo laid out; his Lordſhip at firſt doubted as to making the allowance; but after conſideration was clear he was entitled to an allowance, according to the price at which the annuities were purchaſed. J. D.]

16 May 1774.

Blount v. *Swimmerton.*

AN iſſue *deviſavit vel non*, having been tried, the defendant who was the heir at law, applied for a new trial, which was granted on his payment of the coſts at law.

Afterwards on the 20th of *December* 1774, there was another trial of the ſame iſſue, between the ſame parties, at the inſtance of the heir at law, upon the ſame terms.

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6 June 1774.

Digby v. *Legard.*

Teſtatrix deviſes her eſtates to truſtees to ſell, to pay debts, and deviſes the ſurplus to five perſons, one of whom dies in her life-time; on the queſtion, whether the ſhare given to the perſon dying was to be conſidered as land, it was held land, and to go to the teſtatrix's heir. Renewal of leaſes for lives, a revocation of the will as to thoſe leaſes, but not of leaſes for years, they being perſonalty.

THE queſtion in this cauſe, aroſe on the will of *Elizabeth Bierſly*: ſhe by her will dated the 19th of *April* 1763, begins with directing her funeral expences, debts, and legacies to be paid, and charges all her eſtates with the payment; and for that purpoſe deviſes all her eſtates in *Yorkſhire* and *Durham*, to truſtees to ſell; and alſo deviſes all her leaſehold eſtates for lives to the ſame truſtees to ſell, and bequeaths to them her perſonal eſtate to turn into money, and directs the money to ariſe from all the ſaid funds to be applied in payment of her debts, funeral expences, and legacies: ſhe then gives ſeveral legacies, and as to the reſidue of her perſonal eſtate, and the money to ariſe from the ſaid freehold, and leaſehold eſtates, and rents and profits, ſhe gives as follows: To Lady *Legard* the plaintiff, one fifth; to *Jane Fiſher*, another fifth; to Lady *Cayley*, another fifth; to *Mary Cartwright*, another fifth; and to *Henrietta Digby*, another fifth.

By

By a codicil dated the 2d of *November* 1764, duly attested by three witnesses, reciting the disposition of the surplus of her real, and personal estate, in fifths by her will; she revokes the disposition of the fifth to *Mary Cartwright*, and gives that fifth to *Lucy Osbaldiston*. *Digby* v. *Legard.*

After the will, and codicil, the testatrix surrendered the freehold leases for lives, and obtained new leases.

She also surrendered leaseholds, held for terms of years, and took new leases for further terms.

Lady *Cayley*, to whom the testatrix gave one fifth part of the surplus money, to arise from the sale of her real, and personal estate, after payment of debts, &c. died in the life-time of the testatrix.

Three questions were made in the cause.

One was, whether the surrender of the freehold leases for lives was a revocation of the will, as to those leases.

The same question was made as to the surrender, and renewal of the leases for terms of years.

These points were barely mentioned, and given up: And it was admitted on all hands, that the surrender of the freehold leases was a revocation of the will as to those leases, and that they descended to the heir at law.

And that the leaseholds for years, were personalty; that as to personal estate, a will did not take effect, till the death of the testator, and comprehended the personalty, let it be improved as it might, since the time the will was made.

The third question was, whether the fifth of the surplus money arising from the real estates, devised to

Digby v. Legard.

Lady *Cayley* was to be conſidered ſtill as land, and deſcended to the heir at law of the teſtatrix *Elizabeth Bierſly*, as undeviſed, or was to be conſidered as perſonal eſtate, undiſpoſed, and to go to her next of kin.

On the part of the next of kin, it was inſiſted, that the ſaid teſtatrix having deviſed her real eſtates to truſtees to be ſold, they were to be conſidered from the moment of her death as ſold, and part of her perſonal eſtate.

On behalf of the heir at law, it was inſiſted, that the teſtatrix had only charged, and ſubjected her real eſtates, with the payment of her debts, &c. in caſe the perſonal eſtate were not ſufficient: that the perſonal eſtate was the primary, and natural fund for the payment.

That the ſale of the real eſtates, was to take place only in caſe of the deficiency of the perſonal eſtate.

That it might happen, there was not occaſion to ſell more than a part of the real eſtate, if any of it: And would it be ſaid, ſuppoſing there was not any occaſion to have recourſe to the real eſtates, that the truſtees muſt ſell it? Might not the reſiduary deviſees, as the ſaid eſtates are only ſubjected, and charged with debts, and legacies, have exonerated it themſelves, and called upon the truſtees for a conveyance?

It was therefore inſiſted, that Lady *Cayley*'s ſhare muſt be conſidered as land, and ſhe dying in the teſtatrix's life-time, it muſt be conſidered as undiſpoſed, and to have deſcended to the heir of the teſtatrix.

Lord *Bathurſt* C. was of that opinion, and declared, the fifth given to Lady *Cayley*, who died in the teſtatrix's life-time, was to be conſidered as land undiſpoſed, and

and to belong to the defendant *Jarvis*, the heir at law of the ſaid *Elizabeth Bierſly*. *Digby* v. *Legard.*

His Lordſhip alſo declared, that the leaſehold eſtates held of the Biſhop of *Durham* for lives, the leaſes of which the teſtatrix had renewed after her will, was a revocation as to the deviſe of thoſe leaſes, and deſcended to her heir. And alſo declared, that the deviſe of the leaſes for years, was not affected by the renewal of thoſe leaſes after the will, but that they were to be conſidered as perſonalty, and as ſuch to paſs by the will.

The following caſes were cited *Durour* v. *Motteux* (*a*); *Emblyn* v. *Freeman* (*b*); *Stonehouſe* v. *Evelyn* (*c*); *Mallabar* v. *Mallabar* (*d*).

(*a*) 1 Veſ. 320.
(*b*) Prec. Ch. 541.
(*c*) 3 P. Wms. 252.
(*d*) 2 Eq. Ca. Abr. 431.

Ex parte *Duncombe*. 20 June 1774.

Where the demand is legal, this Court will not grant a writ of *ne exeat regno*.

APPLICATION to diſcharge an order, dated 20th *April* 1774, for a writ of *ne exeat regno*. *Pearne* v. *Liſle*, *April* 1749 (*e*); *Robinſon* v. *Wilkie*, 18 *June* 1753 (*f*), were cited.

(*e*) Ambl. 75.
(*f*) Ambl. 177.

Lord *Bathurſt* C.—This Court is not to be too exact in granting a writ of *ne exeat regno*, ſince to refuſe it, may be attended with irreparable damage, and as it is only till anſwer, and further order, it is the defendant's own fault, in not anſwering, if it hangs over him.

In this caſe, the matter in queſtion is merely legal: and it is not enough to ſay, that ſome of the parties will not join in an action; and therefore I am entitled to a writ of *ne exeat regno*.

Ex parte *Duncombe.*

There is no caſe where this Court hath interpoſed in a legal demand, to hold a party to bail, becauſe a party will not join with the plaintiff in an action.

Therefore let the writ of *ne exeat regno*, and the order for the ſame be diſcharged.

22 June 1774. Lord Bathurſt C.

Brown v. *Greenly.*

A WITNESS examined *de bene eſſe*. At the time he was examined he was diſintereſted: he afterwards became intereſted by the death of his brother. His depoſitions were ordered to be publiſhed.

21 July 1774.

Taylor v. *Bouchier.*

IN this cauſe it was ſaid, a pauper cannot appeal. On inquiry of the Bar that propoſition could not be diſproved, and, in fact, was aſſented to.

13 July 1774.

Barrow v. *Barrow*, et è contra.

Settlement in conſideration of marriage procured by fraud and impoſition in which the wife was not concerned, ſhall not be ſet aſide.

THESE cauſes ſtood for judgment till this day.

Lord Chancellor.—The queſtion in theſe cauſes depends on the ſoundneſs of the underſtanding of *Lawrence Barrow*, and the practices on him.

He was a man of extraordinary underſtanding till the beginning of the year 1761, when he had a ſtroke of the palſy; after which his intellects were quite impaired,

paired, and he was not fit for buſineſs of any kind, being in a ſtate of childhood.

James Baker, the father of the defendant *Charity*, brought about a marriage between the ſaid *Lawrence Barrow* and the ſaid *Charity*; and he was made to execute the ſettlement in queſtion in this cauſe: firſt, to himſelf for life, ſubject to waſte; then to his wife for life, without impeachment of waſte; then to ſons; then to daughters, with *remainder in fee* to the wife.

This eſtate was ſubject to a mortgage at that time, and he was made to covenant that the eſtate was free from incumbrances.

As to his perſonal eſtate, if he did not make any appointment between that time and his death, the wife was to have it.

When the day for the celebration of the marriage arrived, *Charity*, the intended wife, revolted.

The father, being ſenſible it would take time to make new deeds, ordered *Charity*'s name to be eraſed, and *Mary*, the name of another daughter, to be inſerted in it's place. Afterwards *Mary* revolted, and *Charity* was prevailed upon to marry the ſaid *Lawrence Barrow*, and then her name was again inſerted.

Lawrence Barrow being dead, *Samuel Barrow*, the heir at law of the ſaid *Lawrence Barrow* deceaſed, and his perſonal repreſentative, filed his bill, amongſt other things, to ſet the ſaid ſettlement aſide for fraud, and impoſition, and taking advantage of the man's weakneſs.

The queſtion is, whether there is ſufficient ground to ſet it aſide, or to ſend it to a jury for further inquiry, which hath been preſſed.

The

Barrow v. *Barrow*, et è contra.

The firſt conſideration is, whether this be ſuch a caſe as a Court of Equity will interfere in. Unleſs it be a groſs, glaring impoſition, and fraud, the Court will not interpoſe.

Whatever fraud, or impoſition might have been practiſed by others, *Charity* the wife was not concerned in it; and I never knew an inſtance where a ſettlement in conſideration of marriage hath been ſet aſide, and I will not make a precedent for it.

Therefore, let the bill, ſo far as it ſeeks to ſet aſide the ſettlement, be diſmiſſed.

Kinaſton v. *Kinaſton.*

13 July 1774.
1 Bro. C. C. 457. in not. S. C.

Queſtion, whether the perſonal eſtate was exempted from debts, and whether there was a reſulting truſt in the eſtate deviſed in truſt, after the truſts are executed for the benefit of the heir at law.

THE teſtator by his will charged his whole eſtates with the payment of all his debts, legacies, and funeral expences; and, for that purpoſe, he deviſed particular lands to truſtees in truſt to ſell the ſame, and pay his debts, legacies, and funeral expences; and he gave to his wife all his perſonal eſtate whatſoever, and conſtituted her ſole executrix. The debts exceeded the perſonal eſtate.

Lord *Bathurſt* C.—This bill is brought by the heir at law of the teſtator againſt his widow, to eſtabliſh the will of the teſtator.

The firſt queſtion is, whether the perſonal eſtate is exempted from the payment of the teſtator's debts. The perſonal eſtate is the natural fund for the payment of debts, unleſs it be exempted; and by the words of the will I am clear it is exempted. See the caſe of *Wainwright* v. *Bendlows*, 2 *Vern.* 718.

The

Kinaſton v. *Kinaſton.*

The ſecond queſtion is, whether there is a reſulting truſt in favour of the heir at law, in the eſtate deviſed for the payment of debts, and whether any thing undiſpoſed of is any part of the truſt undiſpoſed of.

The eſtate is worth 30,000 *l.*, the debts 16,000 *l.*; ſo that the ſurplus muſt go to the heir at law, except there are words in the will to paſs it. The words of the will are clear.

Thompſon v. *King*, *Auguſt* 1739, founded on *Wheeler* v. *Walrond* (*a*).

(*a*) 1 Eq. Ca. Abr. 210. 3 P. Wms. 63 in not.

The only queſtion remaining is, whether the perſonal eſtate is given to the wife for life only, or abſolutely; and I am of opinion ſhe is entitled to an abſolute intereſt in it.

Richards v. *Baker*, 8 *Geo.* 2. (*b*)

(*b*) 2 Atk. 321.

The plaintiff being the heir at law, and bringing the bill to eſtabliſh the will, it is not neceſſary to eſtabliſh it: and let the bill, ſo far as it ſeeks an account of the teſtator's perſonal eſtate, and to have the ſame placed out, and that prays to be let into poſſeſſion of ſuch part of the real eſtate deviſed to be ſold as ſhall remain unſold, after the truſts of the will concerning the ſame are executed, be diſmiſſed; and declare the widow is entitled to the rents and profits of the reſidue of the ſaid real eſtate during her life, and to the whole of the perſonal eſtate abſolutely.

John

28 July 1774. See Sawyer v. Bowyer. 1 Bro. C. C. 388.

John Browning and *Louiſa* his wife, the widow of the teſtator, - - } Plaintiffs.

James Barton and others, - - Defendants.

(Reg. Lib. A. fol. 482.)

A witneſs examined in chief before the hearing, cannot afterwards be examined before the Maſter without a ſpecial order, and then not to any matters he had been before examined to, or in which he may be intereſted, and the Maſter is to ſettle the interrogatories. See Sawyer v. Bowyer, infr.

BY the decree dated 6th *March* 1773, it was referred to Mr. *Pratt*, one of the Maſters, to enquire what part of the plate and jewels belonging to the teſtator, was at his houſe at *Penwickham* at his death, and of what the paraphernalia of his wife conſiſted, and to ſtate the ſame.

The evidence and proofs taken previouſly to the hearing not being ſufficient to enable the Maſter to ſtate the aforeſaid matter, the plaintiff, on the Maſter's certificate, obtained an order for, and ſued out a commiſſion to examine witneſſes, which was executed and returned.

The defendant *Barton* afterwards diſcovering that *John Le Groſs* and his wife, and *Sarah Preſcott* (which *Sarah* was examined, previouſly to the hearing, on the part of the plaintiff only, and the ſaid *Le Groſs* and his wife had been examined by both ſides), could give very material evidence reſpecting the above enquiry:

(a) 9 July 1774.

Mr. *Ainge*, on the part of the defendant *James Barton*, this day (*a*) moved the Maſter of the Rolls, ſitting for the Lord Chancellor, as of courſe, for leave to examine the ſaid *Le Groſs* and wife, and *Sarah Preſcott*. His Honour, without the leaſt pauſe, ſaid it was contrary to rule; or, if not, that it was not of courſe, and denied the motion; but, being told there had been ſimilar orders upon petitions, his Honour directed me, if any ſuch order were produced, to

draw up an order. One or two were produced, but they not being ſatisfactory, the ſtatement not being full, and ſeeming to have paſſed *ſub ſilentio*, I deſired Mr. *Lee*, the clerk in Court, who was concerned in the cauſe, to turn the motion into a petition to his Honour, and pointedly to ſtate the caſe, and what he prayed. He did ſo; and his Honour, after conſideration, ſaid, he was more confirmed in his opinion, and rejected it; but obſerved, the party might, if ſo adviſed, move it ſpecially.

Accordingly, on this day (*a*) Mr. *Perrin*, on behalf of the defendant, after ſtating the caſe as above, and alleging that, by the rule of the Court, the defendant could not examine the ſaid witneſſes, as they had been examined in chief previouſly to the hearing, without an order for the purpoſe, moved that the ſaid *John Le Groſs* and his wife, and *Sarah Preſcott*, might be examined before the Maſter, on interrogatories to be ſettled by him, on behalf of the ſaid defendant *Barton*; which, after hearing Mr. Solicitor General and Mr. *Holt* for the plaintiff, Lord *Bathurſt* C. ordered, with this addition: that the ſaid witneſſes were not to be examined to any matter they had been before examined to, nor to any matter in which they might be intereſted, and the Maſter to ſettle the interrogatories. His Lordſhip ſaid, he had been appriſed of the motion by his Honour, and had talked with him upon it, and perfectly coincided with him that it was not of courſe, and if granted, to be granted with caution.

(*a*) 28 July 1774.

23 July 1774. Lord Bathurſt C.

Wood v. *Thompſon.*

DEMURRER filed, held on argument, not good; and a demurrer at bar good; the defendant is not to have coſts.

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25 Jan. 1775. Lord Bathurſt C. aſſiſted by Sir Thomas Sewel M. R.

Ord v. *Huddleſton.*

Queſtion, whether to a plea the plaintiff had a right to reply generally, and examine at large.

BILL againſt the defendant for an account, and relief. The plaintiff founds his claims as repreſentative of *Ann Salkeld.*

The defendant pleaded, that *Ann Salkeld*, under whom the plaintiff claimed, was living.

The plaintiff replied, and entered into a general examination to prove his caſe.

The defendant applied this day to ſuppreſs the depoſitions, except ſuch as related to *Ann Salkeld's* being alive, and that the plaintiff might pay the coſts of the *reſpondeas ouſter*. Mr. *Perrin* and Mr. *Madocks* for the plaintiff; Mr. Attorney General, Mr. Solicitor General, and Mr. *Kenyon*, for the defendant.

It was ſaid by the plaintiff, that a plea in abatement puts the whole matter of the bill in iſſue, and that the plaintiff had a right to prove his whole caſe; ſo that ſhould the plea be falſified, the plaintiff might have relief upon the whole of his bill.

Sir

Ord v. Huddleſton.

Sir *Thomas Sewel* M. R.—I ſee no difference whether a plea be over-ruled for want of relevancy, or for being falſified. A replication puts every matter in iſſue.

For the plaintiff it was ſaid, there are three kinds of pleas: firſt, to the juriſdiction; ſecondly, in bar; thirdly, to the perſon. The queſtion is, what kind of plea this is, and what will be the conſequence if determined one way, or the other?

That this is to be conſidered as a plea in bar. A defendant may make as many defences as he pleaſes; and if he chuſes to reſt upon one defence, he is bound by it: as to pleas in abatement, if a plea is over-ruled upon proof, it ſeems as if the defendant ſhould have a *reſpondeas ouſter*.

Lord *Bathurſt* C.—I wiſh there had been precedents, but there being none, the Court muſt act in ſuch a way as not to do injuſtice to either ſide. What is the plea? It is, that the perſon under whom the plaintiff comes before the Court, as his adminiſtrator, is alive. To this the plaintiff hath replied.

If the plea is true, it is impoſſible for the plaintiff to ſtir.

This is the only matter in iſſue, and the plaintiff hath entered into evidence to ſupport his caſe.

The queſtion is, whether the plaintiff having gone into this examination, the depoſitions ſhall be ſuppreſſed.

It hath been argued on the part of the defendant, that an illuſe might be made of them. I do not ſee that: for if the bill is diſmiſſed, the plaintiff will have his coſts:

Ord v. Huddleſton.

coſts: and to ſpeak my ſentiments, when a plea goes to the plaintiff's right of bringing a ſuit, it bars the defendant from making any other defence.

Were it otherwiſe, in many caſes the greateſt inconvenience would reſult to a plaintiff, as it would prevent him from making any diſcovery.

Suppoſe the plea ſhould be diſproved, what is the Court to do? I am in ſome doubt, becauſe his Honour ſeems to think the Court may make a decree upon a plea being diſproved.

As this Court will permit a plaintiff to examine *de bene eſſe*, upon filing a bill, in this caſe I do not ſee any inconvenience can ariſe from what the plaintiff hath done. He hath indeed been miſadviſed. But it doth not appear that he hath examined with any ill view.

If the bill is diſmiſſed where the plaintiff hath no right in equity, the depoſitions are not permitted to be read at law (*a*).

(*a*) *Qu. tamen.* It has been ſaid, that if a bill be diſmiſſed out of Court for irregularity, the whole is irregular, and the depoſitions ſhall not be read. J. D.

There can be no inconvenience to the parties to let the depoſitions ſtand. If they appear not to be relevant, they will have no effect.

Sir *Thomas Sewel* M. R.—The replication filed by the plaintiff ſtrikes me to be a general replication; and I think it neceſſary, whether the plea be to part, or to the whole bill, that the plaintiff ſhould reply to the whole.

Sometimes ſpecial replications are put in: ſuch a replication admits every other part of the anſwer not replied to.

I take this to be a plea in bar; for it is an abſolute denial of the plaintiff's or any perſon's right: it is therefore

therefore incumbent on the plaintiff to prove his right. I conceive, therefore, the plaintiff had a right to reply generally; and having filed such a replication, he is well founded in entering into a general examination. *Ord* v. *Huddleston.*

Lord Chancellor.—Take nothing by the motion.

Neal v. *Cust.*

10 Feb. 1775.

BILL to have a settlement set aside, as being contrary to articles, and to have new settlement made according to the articles.

Settlement set aside as being contrary to articles, and a new settlement to be executed agreeably to the articles.

The cases cited were, *Powel* v. *Price*, 2 *P. Wms.* 535; *Burton* v. *Hastings*, 1 *Eq. Cas. Ab.* 393; *Meredith* v. *Leslie*, in House of Lords (*a*); *Chambers* v. *Chambers*, *Fitzgibbon*, 127, and in *Viner's Abridg.* under *Tit. Contract*; *Parkins* v. *Robins.*

(*a*) 6 Bro. P. C. 209.

Lord *Bathurst* C. declared the settlement to be contrary to the articles; and a new settlement to be executed agreeably to the articles, so far as the uses were existing, and capable of taking effect.

Gemmel v. *Block.*

6 March 1775.

BILL brought by *Gemmel* and *Dallas*, to be paid jointly a particular demand. The Court, upon hearing the cause, being of opinion that the plaintiff *Dallas* was not entitled to any thing, a doubt arose, as the demand was joint, whether the bill, as to one

Bill by two plaintiffs dismissed as to one of them.

Gemmel v. *Block.*

of the plaintiffs, could be diſmiſſed. After two or three days conſideration, Lord *Bathurſt* C. diſmiſſed ſo much of the bill as related to the plaintiff *Dallas* (*a*).

(*a*) Mattiſon v. Mattiſon, 28 July 1773, at the Rolls, was cited as in point, but *Qu.* J. D.

31 March 1775.

Kettleby v. *Kettleby.*

Rundle v. *Pettit*, by bill of revivor.

Bond creditors not to have intereſt beyond the penalty of their bonds.

THE original bill was by the creditors of the teſtators, *James Kettleby*, *Abel Kettleby*, and *Abel Johnſton Kettleby*, for an account, and to be paid their debts out of the reſpective eſtates, perſonal and real, of the ſaid reſpective teſtators.

On hearing the firſt cauſe, the 6th of *December* 1765, the reſpective wills of the ſaid *James Kettleby*, *Abel Kettleby*, and *Abel Johnſton Kettleby*, were eſtabliſhed; and it was referred to Mr. *Montague*, one of the Maſters, to take an account of what was due to the ſeveral mortgagees, and incumbrancers on the eſtates; and alſo an account of the debts, funeral expences, and legacies of the reſpective teſtators; and the Maſter was to advertiſe for the creditors to come before him and prove their debts. An account was alſo directed to be taken of their reſpective perſonal eſtates, which were to be applied in a courſe of adminiſtration; and if deficient, the deficiency was to be raiſed by ſale of the real eſtates, and all parties were to be paid their coſts.

The eſtates were ſold, and the purchaſe money paid into the Bank, and laid out in the purchaſe of 19,657*l.* Bank annuities, in the Name of the Accountant General

neral of this Court, on which there having accrued 694 *l.* 13 *s.* 3 *d.* for intereſt, and the Maſter not having made his general report, the creditors, on the firſt day of *July* 1774, after ſtating the above facts, prayed, as the fund to pay the debts was abundantly more than ſufficient, that the Maſter might compute intereſt from the date of the reſpective bonds, or otherwiſe on the principal of the bonds, from the death of *James Kettleby* the younger, and make a ſeparate report of the debts by ſpecialty, and alſo of the ſimple contract debts, and tax the coſts of the creditors. *Kettleby* v. *Kettleby.*

Mr. *Madocks* was counſel for *Rundle* and his wife, the plaintiffs in the revived cauſe.

Mr. *Ambler* for the other parties.

And after hearing what could be alleged, Lord *Bathurſt* C. ordered, on the above 1ſt *July* 1774 (*a*), that the Maſter ſhould make a ſeparate report of what was due to the creditors.

(*a*) Reg. Lib. A. fol. 387.

On the 1ſt of *December* 1774, the Maſter made his report, and certified that he had taken an account of what was due to the reſpective creditors, ſeveral of whom were creditors by bond; but it appearing that the principal of the bonds, and the intereſt thereon, exceeded the penalties, he had not allowed intereſt beyond the penalties; and certified that there were due to the ſeveral creditors, by bond, and ſimple contract, mentioned in the ſchedule to his report, the ſeveral ſums therein mentioned, amounting together to the ſum of 858 *l.* 12 *s.* 2 *d.*, 12 *l.* 2 *s.* of which was due to two ſimple contract creditors; the remainder to the bond creditors, whoſe bonds appear, by the ſame ſchedule, to be dated in 1701, 1704, 1705, and 1706.

Kettleby v. *Kettleby.*

To this report the bond creditors took exceptions, for that the Maſter had not allowed them intereſt beyond the penalties of their reſpective bonds.

On the 31ſt of *March* 1775, the ſaid exceptions were argued:

When Lord *Bathurſt* C. over-ruled the exceptions reluctantly, as he ſaid, there being ſo over an abundant fund; but that he was tied down by the conſtant, and uniform uſage of the Court.

Knight v. *Maclean.*

Before Mr. J. *Buller*, ſitting for Lord *Thurlow* C.

Similar exceptions, and upon the ſame ground, were taken to the report of Maſter *Ord.*

Mr. Juſtice *Buller*, on a determination of Lord *Mansfield*, thought the exceptions founded, and allowed them.

The exceptions coming on to be re-argued before Lord *Thurlow*, his Lordſhip ſaid he would conſider of it, and talk with the Judges; and, by his direction, I ſent him copies of the caſes of *Grosvenor* v. *Cook*, ſupr., *Gibſon* v. *Egerton*, ſupr., and this caſe of *Kettleby* v. *Kettleby*; and on a ſubſequent day, he ſaid he had converſed with the Judges, who were ſatisfied as he was, that a bond creditor was not entitled beyond the penalty of his bond; and therefore over-ruled the exceptions, which before had been allowed by Mr. J. *Buller.*

And in *Tew* v. *Winterton*, Lord *Thurlow* over-ruled exceptions taken on the ſame ground. J. D.

Barret v. *Glubb.*

11 May 1775.

The purchaſer of an advowſon, knowing at the time of the purchaſe, that the incumbent was on his death-bed, and who, in fact, died the next day. *Qu.* whether the contract was ſimoniacal and void.

THE bill was, to have a ſpecific performance, and execution of the grant of an advowſon to the plaintiff, and to reſtrain the defendant from commencing any ſuit, or *quare impedit* on this caſe.

John Glubb was ſurviving truſtee for ſelling the advowſon in queſtion, and other eſtates of the defendant *Roll.*

The

The other eſtate had been ſold. The advowſon had been long on ſale, the price ſet being thought too high.

There were advertiſements for the ſale, with directions to apply to *Roll.*

The plaintiff applied by letter to know the loweſt price.

The price being thought too high, the plaintiff wrote to *Glubb*, offering 1200 *l.* Afterwards he employed *Clayfield*, and commiſſioned him to go to the extent of 1400 *l.*, who kept chaffering till 10th *Auguſt* 1772; when *Clayfield* finiſhed the bargain with *Roll* for 1400 *l.*, paid 20 *l.* in part, and took *Roll's* receipt.

After the contract was ſigned, the plaintiff employed his attorney to prepare deeds of conveyance, and tendered them for execution, and the remainder of the purchaſe money.

At this time there ſeemed to be a diſpoſition in *Glubb*, and *Roll* to be off the bargain; and they offered *Clayfield* ſomething to relinquiſh it.

During this parleying, *Morgan* the incumbent died, and the plaintiff preſented.

It was inſiſted, that the purchaſe of an advowſon when the incumbent is dying is void.

Lord *Bathurſt* C.—Let a caſe be made for the opinion of the Judges of the Court of Common Pleas, and let the queſtion be, whether a man purchaſing a rectory with the cure of ſouls, having notice that the incumbent was on his death-bed, and uncertain whether he would live over the night, and, in fact, the incumbent dying the next day, and the purchaſer preſenting his clerk the living, ſuch a purchaſe to be void, as being upon a ſimoniacal contract (*a*).

(*a*) The certificate of C. B. was as follows: Bl Rep. 1052: We have heard Counſel on both ſides, and conſidered this caſe, and are of opinion the preſentation is not void, it not appearing to us to have been made on a ſimoniacal contract. W. De Grey, H. Gould, W. Blackſtone, G. Nares.

15 May 1775.

Parkinſon v. *Kerridge.*

Application to revive in a month, or to diſmiſs the bill againſt the ſurviving defendant, publication having paſſed; denied upon conſideration.

BILL againſt two defendants. The plaintiff proceeded to the examination of witneſſes, and to paſs publication. One of the defendants died. The ſurvivor moved on the 19th of *January*, upon a notice, that the plaintiff might revive in a given time, or the bill be diſmiſſed; which, in the hurry of the ſeal, was ordered. The order being novel, and there being an objection to it, for that the ſuit did only abate as to the party that was dead; and for that the ſurviving defendant might ſet down the cauſe, and it would not lie with the plaintiff to object for want of parties. I deſired the party to have it mentioned again to the Court: accordingly, this day (*a*) Mr. *Kenyon* moved the ſame *de novo*, and ſtated the Regiſter's objections; when the Court directed the order made the 19th *January* not to be drawn up.

(*a*) 15 May 1775.

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26 May 1775.

Attorney General v. *Hutchinſon.*

A legacy to build a ſchool-houſe, and to endow it, the pariſh having land on which a ſchool-houſe formerly ſtood, held to come within the Statute of Mortmain.

THE teſtator, by will, gives 1500 *l.* to erect and build a ſchool-houſe, and other buildings, and 2000 *l.* to endow it.

The pariſh have a piece of land, on which a ſchool-houſe formerly ſtood.

The queſtion is, whether this is within the Statute of Mortmain?

Mr. Solicitor General ſaid, there was an anecdote handed down of the framers of the ſtatute of 9 *Geo.* 2. that

Attorney General v. *Hutchinſon.*

that they wanted to extend it to all gifts, and donations.

Lord *Bathu ſt* C.—This is, in all it's circumſtances a new caſe. It is charged by the bill, and proved, that there is a piece of land belonging to the pariſh on which a ſchool-houſe might be built.

The queſtion is, if land is already got, and there is no occaſion to acquire land in mortmain, whether building a houſe upon ſuch land, with money left for that purpoſe, is within the ſtatute.

Money left to *repair or rebuild* upon land in mortmain, is not within the words, much leſs within the ſpirit, of the ſtatute, and is not to be aſſimilated to the caſe of *Brodie* v. Duke of *Chandos*, 14th *December* 1773, which was to build a parſonage-houſe.

As to building on the land ſaid to be charity land, it would be abſorbing the charity.

Therefore, let the bill be diſmiſſed.

Rawſon v. *Turner.*

27 May 1775.
Qu. 1725.
Ca. in Ch. 42.
S. C. ſemb.

BEFORE inrolment of the order made on arguing exceptions to a decree of charitable uſes, it may be re-heard.

27 Nov. 1775.

Starkie v. *Smith.*

(Reg. Lib. B. fol. 54.)

Legacies to infants at twenty-one, the Court would not order them to be ſecured. *Qu.*

JOHN Starkie, by his will, dated the 1ſt of *October* 1763, gave ſeveral pecuniary legacies, payable immediately, and gave to his eldeſt grandſon, the plaintiff *Richard Starkie*, 3000*l.* at twenty-one, and to his other grand-children, to the number of four, 1000*l.* each at twenty-one; and directed the reſidue to be placed out at intereſt for the benefit of his eldeſt grandſon.

The executors proved the will, and poſſeſſed aſſets ſufficient.

The plaintiffs brought their bill for an account, and to have their legacies ſecured.

The Court would not direct the legacies to the infants at twenty-one to be placed out, but gave the infants liberty to apply for their legacies when payable.

Feb. 1776.

Penny v. *Penny.*

(Reg. Lib. B. fol. 277.)

Heir at law, not being the ſole plaintiff, brings a bill to eſtabliſh the will, the Court declared it well proved, and eſtabliſhed the ſame.

WILLIAM Penny the father of the plaintiffs, deviſed his real eſtates to the defendants in truſt, to ſell to pay his debts, and to divide the ſurplus of the money ariſing from the ſame equally among the plaintiffs, one of whom was his eldeſt ſon, and heir at law.

The

The bill was brought to eſtabliſh the will, and to carry the truſts into execution. *Penny* v. *Penny*

Upon hearing the cauſe, Sir *Thomas Sewel* M. R. declared the will well proved, and that the ſame ought to be eſtabliſhed.

[Mr. *Lloyd* mentioned this as a precedent to ſhew, that though an heir at law brings a bill to eſtabliſh a will, the Court will declare it, upon evidence, well proved; that his Honour did it after doubting the propriety.

The reaſon is obvious; the heir at law is not the ſole plaintiff; the other plaintiffs, whoſe intereſt it is to eſtabliſh the will, join in the bill for the purpoſe. *Had the heir at law been the ſole plaintiff*, I do not think his Honour would have done ſo, having heard it often declared by the Court to be improper, and unneceſſary, and I believe no inſtance of it can be produced. J. D.]

Wilſon v. *Ginger*.

19 Feb. 1776. Lord Bathurſt C.

A DEFENDANT neglecting to name an attorney for the purpoſe of trying an iſſue out of this Court, was directed to do it in four days, or the iſſue to be taken as tried, and a verdict for the plaintiff (*a*).

(*a*) Conſtable v. Angel, 25 June 1777. The like order.

Mary

8 March 1776.

Mary White, deviſee in truſt, and executrix in the wills of *Bridget White*, and *John White*, - - } Plaintiff.

AND

Taylor White Eſquire, ſon and heir of *Taylor White*, who was brother and heir of *John White*, tenant for life of the eſtates deviſed by the will of *John*, of which he had a diſpoſing power, and tenant in tail of an eſtate in ſettlement, which *John*, the only tenant for life of the ſame, deviſed: *Thomas Wollaſton White*, the firſt ſon of the defendant *Taylor White*, and the firſt remainderman in tail of the deviſed eſtates, expectant on the death of his father, and others, - - - } Defendants.

(Reg. Lib. B. fol. 650.)

Tenant in tail of eſtates in ſettlement deviſes thoſe eſtates, and other eſtates of which he was ſeiſed in fee, to his heir at law, who was the next remainderman in tail for life, with remainders over; and alſo a legacy of 1000 l.: the heir claims the eſtates in oppoſition to the will. The Court would not put him to his election.

THE bill was to have the direction of the Court how to act under the wills of the ſaid *Bridget White*, and *John White*.

The bill, amongſt other things, ſtated that the ſaid *John White*, being ſeiſed in fee, or from an idea of his being ſo ſeiſed, of conſiderable real eſtates in the counties of *York*, and *Nottingham*, gave life eſtates in part of them to particular perſons, charged other eſtates with annuities, and created terms out of other parts of the eſtates, for the purpoſe of raiſing out of the rents, and paying 250 *l.* a-year to the defendant *Taylor*

Taylor White, during the joint lives of the ſaid defendant, and his father (which was paid accordingly), and for raiſing certain legacies: And the teſtator, by his ſaid will, gave 1000 *l.* to the defendant *Taylor White*. And ſubject to the ſaid charges and terms, the teſtator deviſed the ſaid eſtates, and all other his real eſtates, to *Taylor White* (the defendant) for life; remainder to truſtees to preſerve, &c.; remainder to his firſt and other ſons in tail male, with other remainders; with remainder to his own right heirs; and appointed the plaintiff and another executors; but the plaintiff alone proved the will.

After making the ſaid will, the teſtator contracted for the purchaſe of other eſtates, and under an incloſing act of parliament, part of the eſtates deviſed were exchanged for other eſtates.

The defendants ſetting up oppoſite claims, the plaintiff filed her bill, as above, to have the direction of the Court, and prayed an eſtabliſhment of the will, and an execution of the truſts.

Taylor White the father (an original defendant, ſince dead), by his anſwer admitted the wills, but ſaid he did not know whether *John* his brother was ſeiſed in fee, or had only an eſtate tail in the eſtates deviſed by him, having never ſeen the writings

In 1773 the ſaid defendant *Taylor White* died. He left the above-named defendant *Taylor White*, his ſon and heir; and he claiming in oppoſition to the will of *John White*, the plaintiff filed a ſupplemental bill againſt him and the defendant *Thomas Wollaſton White*, praying that the ſaid defendant *Taylor White* might ſet forth his claims, and charging that he ought to elect whether

White v. *White* et al.

whether he would take under the will, or renounce all benefit under it.

The defendant *Taylor White*, by his anſwer, ſaid he was the heir at law of *Taylor White* his father, who was brother and heir at law of the ſaid *John White*, who was heir at law of *Bridget*; and that he claimed ſuch eſtates of *John*, of which he died ſeiſed in fee, and that did not paſs by his will.

The anſwer then ſtates a ſettlement, dated in *June* 1685, made on the marriage of *Richard Taylor* with *Bridget*, by which the eſtates therein mentioned were ſettled to the uſe of the huſband and wife for their reſpective lives, remainder to truſtees to preſerve, &c.; remainder to the firſt and other ſons of the marriage in tail male; then to the daughters in tail general; remainder to the right heirs of the ſaid *Richard Taylor*.

That there was iſſue of the ſaid marriage only one daughter, who in 1690 intermarried with *Thomas White*, the grandfather of the defendant *Taylor White*; that there was iſſue of that marriage the before-named *John White* the teſtator, *Taylor White* the defendant's brother, and *Bridget White* the teſtatrix.

That the ſaid *Thomas White* the grandfather died in 1732, leaving the above iſſue of his ſaid marriage.

That *Bridget* his widow died in 1761, having done no act to bar the entail of the eſtates in the ſaid ſettlement of 1685.

That upon her death all the ſaid eſtates came to the ſaid teſtator *John White*, who did not bar the entail, but had never theleſs taken upon himſelf to deviſe the eſtate

eſtate ſo in ſettlement, which he had not any power to do.

That upon his death thoſe eſtates came to *Taylor White*, the defendant's late father, as tenant in tail; that he did not bar the entail, and therefore, upon his death, the defendant took an eſtate tail in the premiſes; that he had ſince levied a fine of the premiſes, and had declared the uſes to himſelf in fee.

That he had entered on the eſtates which did not paſs by the will, which were after purchaſed, and the exchanged eſtates, and had cut down timber thereon, and inſiſted he was entitled, as tenant for life, to ſuch of the eſtates deviſed by the will of *John*, as *John* had a diſpoſing power over, and claimed the legacy of 1000 *l.*, and further inſiſted, he ought not to be put to his election.

The cauſe came to be heard 7th and 8th *March* 1766; and after hearing the ſaid ſettlement of 1685, the wills of *Bridget* and *John White*, and the ſeveral contracts entered into by the teſtator *John White* read, and the defendant *Taylor White*, the heir at law, admitting the wills of the ſaid *Bridget White* and *John*, they were eſtabliſhed.

The Lord Chancellor then proceeds to direct the neceſſary accounts, and the Maſter to diſtinguiſh the ſettled, and unſettled eſtates deviſed; and though his Lordſhip doth not in expreſs words ſay the defendant *Taylor White* is not bound to elect, he in effect ſays ſo, by decreeing payment to the defendant *Taylor White*, of the legacy of 1000 *l.*, and the profits of the eſtate deviſed to him for life.

Hill

6 May 1776.

Hill v. Biſhop of *Briſtol*.

Lord *Bathurſt* C.

On marriage, the wife's eſtate is ſettled on the huſband for life, on the wife for life, remainder to the iſſue of the marriage in tail; remainder in fee to the ſurvivor of huſband, and wife: the huſband and wife levy a fine, and mortgage the eſtate: the huſband ſuffers the eſtate to become abſolute in the mortgagee, and dies: his widow held entitled to redeem.

BILL to redeem againſt the repreſentative of Lord *Carpenter*.

The plaintiff, the widow of *Hill*, was originally entitled to the eſtate in her own right.

On her marriage, it was agreed to be ſettled on the huſband for life, on the wife for life; remainder to the iſſue of the marriage in tail; remainder in fee to the ſurvivor of the huſband and wife.

After the marriage, the huſband and wife levy a fine and mortgage the eſtate; and the huſband ſuffers the eſtate to become abſolute in the mortgagee, and dies.

The queſtion in the cauſe is, whether the plaintiff hath a right to redeem?

On the part of the defendant it is inſiſted, that *Bilward* the mortgagee having obtained a decree, and Lord *Carpenter* having bought him out, the eſtate is bound.

A volunteer is bound by the act of a mortgagee.

The queſtion then is, whether the plaintiff is a volunteer, or a purchaſer for a valuable conſideration? She certainly is not a volunteer, and conſequently ſhe is entitled to redeem.

But Lord *Carpenter* having a further charge on the eſtate for two annuities, is entitled to the eſtate after the plaintiff's eſtate for life.

Therefore the Lord Chancellor declared, that the plaintiff was entitled to redeem the eſtate, on payment of what, if any thing, remained due on the mortgage; and in caſe ſhe paid any thing, ſhe was

to

to ſtand as a creditor for that ſum on the reverſion. And after the death of the plaintiff, the repreſentative of Lord *Carpenter* was to ſtand as a creditor on the reverſion, for the arrears of the two annuities. *Hill* v. Biſhop of *Briſtol.*

May v. *May.*

19 July 1776.

THE father, by his will, appointed guardians of his infant children. The will not being properly executed, the Maſter of the Rolls, upon hearing the cauſe, referred it to the Maſter to approve of a proper perſon to be appointed guardian of the infants, and prefaced the order thus: And it appearing by the ſaid teſtator's will (as the will is ſet forth in the anſwer of *A.* and *B.*, that it is mentioned the ſaid teſtator appointed the ſaid defendants, &c. ſince deceaſed, guardians of his children; but the ſaid will not appearing, or having been proved to have been properly executed, or atteſted, as a good and valid appointment of ſuch guardians; therefore, refer it as above.

Haſſel v. *Haſſel.*

Nov. 1776.

THOMAS *Haſſel*, the plaintiff's father, made his will as follows:

Teſtator begins his will; As to all my worldly eſtate, I give, deviſe, and bequeath as follows: he gives firſt houſehold

In the name of God, Amen. I *Thomas Haſſel*, do make this my will as follows: "And as touching and

furniture to his wife; then he goes on to give, deviſe, and bequeath, particular ſums, as legacies to his younger children, with maintenance; and concludes by giving, deviſing, and bequeathing, all and ſingular his real and perſonal eſtate not therein diſpoſed to his ſon the defendant: the legacies to the children held to be a charge on the real eſtate, in aid of the perſonal.

concerning

Haſſel v. *Haſſel.*

concerning my *worldly* eſtate, I give, *deviſe*, and bequeath, as follows: Firſt; I give my houſehold goods, &c. to my wife for life."

I give, *deviſe*, and bequeath to *Mary Haſſel*, 300 *l.* at twenty-one. *Item*, I give, *deviſe*, and bequeath, unto my daughter *Frances* 300 *l.* at twenty-one. *Item*, I give, *deviſe*, and bequeath, to my ſons *William T. F.* and *John* each 220 *l.*, to be paid at twenty-one, with benefit of ſurvivorſhip. *Item*, my will is, that my executor, with the advice of my truſtee, ſhall place out my ſons apprentices, and pay out of their aforeſaid fortunes proper ſums on that account; and to be allowed out of their reſpective fortunes when of age. *Item*, my executor is to pay to my truſtee 30 *l.* a-year for the education of the children. *Item*, I give, *deviſe*, and bequeath to my ſon *Halford Haſſel*, (the defendant) all and ſingular my *real* and *perſonal eſtate*, *not herein diſpoſed*, to him, his heirs, and aſſigns, and I appoint my brother *Haſſel* overſeer of my ſaid will."

The teſtator died: the defendant proved the will, and poſſeſſed the perſonal eſtate, and entered on the real eſtates.

The bill was by the four younger children, to be paid the legacies given by their ſaid father's will as portions, and if the perſonal eſtate were not ſufficient, out of the real eſtates.

For the plaintiffs it was argued, that the teſtator having expreſsly declared it was his will to diſpoſe of *all* his worldly eſtate, and having, on the giving of the legacies to his children, uſed the word *deviſe*, which is applicable to real eſtates, and having, by the reſiduary clauſe, given, *deviſed*, and bequeathed, all and

and ſingular his real and perſonal eſtate *not therein before diſpoſed*; and having directed the legacies to be paid by his executor to whom he had given his real eſtate, it was manifeſtly the intent and meaning of the teſtator to charge the ſaid legacies, and that the ſaid legacies were charged, on the real eſtate. *Haſſel* v. *Haſſel*.

For the defendant it was argued, that the legacies being money legacies were to be paid out of the perſonal eſtate; and the real eſtate not being expreſsly charged with them by the will, the plaintiffs had no right to come upon the real eſtate for payment.

Lord *Bathurſt* C. held the legacies to be charged on the real eſtate in aid of the perſonal.

Clark v. *Roſs*.

27 Nov. 1773. Lord Bathurſt C. 1 Bro. C.C. 120. in not. S. C.

Legacy charged upon land, payable at a certain time: the legatee dies before that time; but being charged, and the eſtate deviſed ſubject to that charge, the deviſee muſt take it *cum onere*, and the legacy ſhall be raiſed.

J. D. Acres Maſon Eſquire, by his will, dated 18th *November* 1736, amongſt other things, deviſed all his freehold and copyhold eſtates to truſtees named in the will, to the uſe of *Theodore Joſeph Maſon* for life, remainder to truſtees to preſerve contingent remainders; remainder to his firſt and other ſons in tail male; remainder to the daughters; with *remainder in fee to Captain Alexander Wilſon*: and willed, that if the ſaid Captain *Wilſon*, or his heirs, ſhould actually come into poſſeſſion of the premiſes, by virtue of the aforeſaid limitations, that they ſhould *pay* his daughter *Catherine Wilſon* 2000 *l.*; and *thereby* charged *the premiſes with payment* of the ſaid 2000 *l.* to the ſaid *Catherine Wilſon*, at the end of two years after the ſaid *Alexander Wilſon* ſhould come into poſſeſſion.

Clark v. *Roſs.*

In 1737 the teſtator died.

In *April* 1743 the ſaid *Catharine Wilſon* died, having firſt intermarried with *William Draper*, in whom the ſaid 2000 *l.* became veſted; and he died, having made his will, and the plaintiff ſole executor and reſiduary legatee, who proved the will.

In 1750 a commiſſion of bankruptcy iſſued againſt the ſaid *Alexander Wilſon*, to whom the remainder in fee of the aforeſaid eſtate was limited; and his eſtate was aſſigned to defendant *Roſs* his aſſignee.

In *Auguſt* 1769, the ſeveral antecedent limitations being ſpent, the ultimate remainder to Captain *Wilſon* took effect, and the eſtates veſted in the defendant *Roſs*, the aſſignee of *Wilſon*.

Two years being lapſed ſince the ultimate remainder in *Wilſon* took effect, the plaintiff filed his bill to have the ſaid legacy of 2000 *l.* raiſed, and paid.

It was inſiſted, that as *Catherine Wilſon* died before the remainder-man in fee in the will came into poſſeſſion, the ſaid legacy being given out of land, was not to be raiſed.

The following caſes were cited, Attorney General v. *Milner*, 1ſt *February* 1752 (*a*); *King* v. *Wilkinſon*; *Lowther* v. *Condon* (*b*); *Van* v. *Clarke* (*c*); *Sirman* v. *Collins*; *Bulkly* v. *Stanly*; *Miles* v. *Leigh* (*d*), in *Viner's Abridg.* under title *Charge*, p. 463, 2 *July* 1729; *Powlet* v. *Powlet* (*e*), firſt eſtabliſhed, that where a portion is charged on land by deed, and the child dies, it is not to be raiſed; in *Smith* v. *Smith* (*f*), the diſtinction taken was, that a portion under a will is to be raiſed, but not under a deed; *Hutchins* v. *Toy*; *Hodſon* v. *Rawſon*; *Hall* v. *Terry* (*g*); *Thompſon* v. *Dow* (*h*), 28th *June* 1763.

(*a*) 3 Atk. 112.
(*b*) 2 Atk. 127. 130
(*c*) 1 Atk. 510.
(*d*) 1 Atk. 573.
(*e*) 1 Wils. 224.
(*f*) 2 Vern. 92. 178.
(*g*) 1 Atk. 502.
(*h*) 1 Bro. C. C. 193, in not.

Lord

Lord Chancellor.—I am of opinion the legacy veſted in *Catherine Wilſon*, and is a charge on the land. And the land being deviſed to Captain *Wilſon*, ſubject to that charge, he muſt take it *cum onere*. Therefore, let the Maſter compute intereſt on the legacy from the end of two years after the ultimate remainder in Captain *Wilſon* veſted in poſſeſſion, and let what ſhall be found due be raiſed.

Clark v. *Roſs.*

Pawſey v. *Edgar.*

15 Nov. and 17 Dec. 1776. 1 Bro. C.C. 191. in not. S. C.

Devereaux Edgar, by his will, gave his real eſtate to *Temperance* his wife for life; remainder to his eldeſt ſon *Robert*, the father of the defendant, for life; remainder to his iſſue male in tail; remainder to the ſaid *Robert* in fee; ſubject and charged, within ſix months after the death of the ſaid *Temperance* his wife, to pay to his two daughters, *Temperance* and *Mary Edgar*, 600 *l.* each, with intereſt at 5 *per cent.* from the death of the ſaid *Temperance* his wife; and in default of payment, deviſed the eſtate to the legatees to hold till payment.

Eſtate given to the teſtator's wife for life, and after her death, to her ſon and his heirs, charged with a legacy: the legatee ſurvived the teſtator, but died in the life-time of the wife: the legacy held to have veſted, and to be charged on the eſtate.

The teſtator died in 1739.

Robert Edgar the ſon died in 1750, and left the defendant his eldeſt ſon and heir, to whom the eſtate deſcended.

Temperance, one of the legatees, died in *Auguſt* 1754, and *Mary*, the other legatee, took out adminiſtration to her.

In 1754, *Temperance* the widow, died.

In 1774, *Mary* the other legatee died, having made her will, and the plaintiff her executor.

Pawſey v. *Edgar.*

The plaintiff contends the legacies veſted, and are tranſmiſſible, and as executor of *Mary*, hath filed a bill to have the legacies raiſed and paid.

The defendant inſiſts, that as *Temperance* the legatee, died in the life-time of *Temperance* the widow, which was before the legacy became payable, it ſunk into the reverſion of the eſtate.

The ſame caſes were cited in this cauſe, as in the caſe of *Clarke* v. *Roſs*, immediately preceding.

It ſtood for judgment to this day.

His Lordſhip for the ſame reaſons, upon which he determined that cauſe, declared, that the defendant took the eſtate *cum onere*, that the legacy veſted, and the plaintiff was entitled to it, and ordered it to be raiſed.

His Lordſhip obſerved, that the caſe of *Hall* v. *Terry*, had been preſſed upon him, and which was ſaid to be confirmed by *May* v. *Andrews*, 30th *June* 1768, but that it was very different from the principal caſe.

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23 Jan. 1777.

Ruſſel v. *Atkinſon.*

The time to examine to the credit of a witneſs is, after publication is paſſed, and the application for it is of courſe, and not founded on affidavit.

An order of courſe had been obtained, to examine to the credit of a witneſs, after publication had paſſed, and the cauſe was ſet down for hearing; the defendant applied the above day, to diſcharge the order as irregularly obtained; for that it was not founded on affidavit, and was after publication; and was not moved ſpecially on notice, according to Lord *Bacon's* order, which ſays, theſe orders are to be granted ſparingly, and upon ſpecial application. But Lord *Bathurſt*

Bathurſt C. and Sir *Thomas Sewel* M. R. were both of opinion, that the order was regularly obtained; that it was neceſſary publication ſhould have paſſed, for till then it could not be known, whether it was neceſſary to examine to the credit of the witneſs; that the order was of courſe, but if the party ſtayed a conſiderable time after, and did it merely for delay, it might be a ground to diſcharge the order. *Ruſſel* v. *Atkinſon.*

Nicholas v. *Mills.* Hil. 1777.

EXCEPTIONS lie to the certificates of commiſſioners in commiſſions of partition, which certificates are confirmed, as reports are.

Norden v. *James.* 20 Feb. 1777.

A GENERAL aſſignment of a debtor at *Madras*, in the *Eaſt Indies*, not an act of bankruptcy in this country.

Manningham v. Lord *Bolingbroke.* 10 Feb. & 14 July 1777.

Bill for diſcovery and relief, charging fraud. Demurrer overruled, the bill being for relief againſt fraud, the defendant muſt anſwer.

THE queſtion aroſe on a demurrer to a bill filed by a judgment creditor of the defendant Lord *Bolingbroke*: The creditor had brought an action of debt, and had obtained judgment; but before he had *ſued* out execution, the defendant, *as charged* by the bill, had conveyed his eſtate, *in order to prevent* the execution

Manningham v. Lord *Bolingbroke.*

from having effect; the bill was for a diſcovery of the conveyance, and for relief; the demurrer was for that the plaintiff had not proceeded to an *elegit*, and therefore was premature.

The caſes cited were, *Dowdeſwell* v. *Tomkins*, 15th *May* 1740; 1 *Siderfin*, 91; 1 *Keble*, 368; 1 *Salkeld*, 118; 1 *Eq. Caſes Abr.*; 1 *Ventris*, 398; Lady *Abergavenny* v. Lady *Abergavenny*, 2 *P. Wms.* 311; 1 *Hobart*, 47.

Lord *Bathurſt* C.—The bill being to be relieved againſt fraud, the defendant muſt anſwer; over-rule the demurrer.

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12 March 1777.

Palmer v. *Palmer.*

Surrender of a copyhold ſupplied, in order to pay a legacy.

BILL to be paid a legacy, and to have a copyhold deviſed, in aid of the perſonal eſtate, not having been ſurrendered by the teſtator, ſurrendered by his heir, to the uſes of the will.

The caſes cited were, *Hawkins* v. *Leigh*, 1 *Atkins*, 387; *Bradly* v. *Bradly*, 2 *Vern.* 163; *Wilkins* v. *Saunders*; *White* v. *Nutt*, 1 *P. Wms.* 61.

The heir at law, upon terms, ordered to ſurrender the copyhold eſtate to the uſes of the will.

Pendergraſt

Pendergraſt v. *Saubergue.*

18 March 1777. Lord Bathurſt C.

(Reg. Lib. B. 1776. fol. 217.)

The defendant, to prevent his being brought up by an *alias pluries habeas corpus* as often as he was turned over to the Fleet, removed himſelf back to the King's Bench; ordered if he did not put in his anſwer by the time, an *alias pluries*, would have iſſued, the bill ſhould be taken *pro confeſſo* againſt him.

THE defendant being brought up by *habeas corpus*, and turned over to the Fleet, in order to proceed to an *alias pluries habeas corpus*, and to have him brought up, in order to take the bill *pro confeſſo* againſt him, for want of his anſwer, according to the uſual courſe of proceeding, the defendant, in order to prevent it, as ſoon as he was carried to the Fleet, removed himſelf back again to the King's Bench. The Court was for ſome time under a difficulty how to proceed, but at laſt hit upon this expedient: It was ordered, that unleſs the defendant put in his anſwer, on or before the laſt day of the then next term, which it was computed, would be the time between each proceſs, were the plaintiff to proceed regularly to an *alias pluries habeas corpus*, the plaintiff was to be at liberty to apply for the Clerk in Court, to attend with the record of the plaintiff's bill, in order to take it *pro confeſſo*, againſt the ſaid defendant.

Wilſon v. *Boſwell.*

15 May 1777.

A WRIT of *ne exeat regno*, to prevent the defendant's going to *Scotland.*

Trin. 1777.

Maſon v. *Murray.*

An injunction doth not drop of courſe, on the plaintiff's amending his bill.

THE plaintiff was the author of ſome poems; the defendant was a bookſeller; the plaintiff filed his bill againſt the defendant, to ſtay him from printing, &c. ſome of his works, and obtained a ſpecial injunction; the defendant anſwered, and afterwards the plaintiff amended his bill; on application this term, a queſtion was made, and inſiſted on by the defendant, that the plaintiff having amended his bill, the injunction was gone of courſe.

It ſtood over till this day, and Lord *Bathurſt* C. having directed me to lay before him my thoughts on the point, whether an injunction dropt of courſe, on the plaintiff's amending his bill, or on a demurrer being allowed, I wrote him a letter as follows;

'It was ſaid, "that the plaintiff having amended his bill, the injunction was gone of courſe, without application."

'By Lord *Bacon*'s twentieth ordinance, "No injunc-
'tion of any nature ſhall be granted, revived, *diſſolved*,
'or ſtayed, upon any private petition;" from whence it
'may be inferred, that an injunction muſt be *diſſolved*
'*by order* upon motion in open Court. In the Practi-
'cal Regiſter in Chancery, printed in 1714, it is truly
'ſaid, that after an injunction hath been diſſolved, that
'is for want of equity, the equity in the bill on which
'it is founded, and of which the Court hath judged, it
'cannot be revived on the plaintiff's amending his bill,
'but on *ſpecial* application; but the diſtinction, that an
'injunction is gone of courſe upon bill's being amend-
'ed, is novel; a bill may be amended for various pur-
'poſes not connected with the injunction: An injunc-
'tion

'tion is only one head of relief. The amendment may 'not in the leaſt degree relate to the injunction. It, 'therefore, ſeems extraordinary to ſay, that if a plain-'tiff amends his bill, though in no wiſe to ſupport the 'injunction, there is an end of it: Is not the Court to 'judge, and determine? Amending a bill, is certainly 'admitting the anſwer to it to be full, and that excep-'tions will not lie to the anſwer; and yet *non conſtat*, 'that there may not be enough diſcovered, or admitted 'on the anſwer to ſupport the injunction.'

I then referred his Lordſhip to the caſe of *Mayne* v. *Hechin*, ſupr. 255, and then proceeded thus:

'A plea allowed is a full anſwer, yet the defendant 'always applies by motion to diſſolve the injunction, '(though abſolutely), in the firſt inſtance; *Phillips* v. '*Langham*, 29th *November* 1750.

'The defendant's counſel ſaid, that had he demurred 'before the injunction, it would not have been granted 'till the demurrer had been argued. *Raſhleigh* v. *Buller*, '11th *June* 1752(*a*). The preſent demurrer hath not 'been argued; ſuppoſing it had been allowed, it was 'ſaid, that cauſe was out of Court, and the injunction 'was gone; but with ſubmiſſion, as the injunction is 'under the Great Seal, can it be ſaid to be gone, or diſ-'ſolved, without an order for that purpoſe? An in-'junction ſuit abates by death, yet the injunction is not 'gone. Every day proves the contrary, by motion for 'the executor, or adminiſtrator to revive in a limited 'time, or that the injunction may be diſſolved.'

(*a*) Supr. 153.

His Lordſhip did me the honour this day, to ſtate to the Bar, what I had ſubmitted to him as above, and declared,

Maſon v. *Murray.*

clared, he was clearly of opinion upon conſideration, and upon the caſe of *Mayne* v. *Hochin*, that the injunction did not drop upon the plaintiff's amending his bill.

17 Dec. 1777.

Peach v. *Phillips.*

Mortgage to the deviſee after making the will, no revocation of it.

ROBERT *Cheſhire* made his will as follows: "I order all my debts, and funeral expences to be paid by my executor." He then gives legacies to the plaintiff and others, and then goes on: "And laſt I give and "bequeath all the reſt of my houſes, meſſuages, lands, "tenements, and hereditaments, and the reſt of my "perſonal eſtate to *James Phillips* (the defendant), "and appoint him my executor."

After the will, the teſtator mortgaged his real eſtate, to ſecure the ſum of 1500 *l.* to the ſaid *James Phillips.*

On the death of the teſtator, *Phillips* proved the will, poſſeſſed the perſonal eſtate, and entered on the real eſtates, and received the rents and profits.

The plaintiff is the heir at law, and brings a bill, for an account of the rents and profits of the mortgaged eſtate; for an account of the teſtator's perſonal eſtate; and to have the eſtate in mortgage to *Phillips*, diſcharged of it, by an application of the perſonal eſtate.

The firſt queſtion in the cauſe was, what eſtate *Phillips* took; whether an eſtate for life, or in fee?

Secondly,

Peach v. Phillips.

Secondly, Whether the mortgage after the will, was not a revocation of the will, as to the real eſtate *in toto?*

The caſes cited were, *Hopewell* v. *Acland, Salk.* 239, in which it was ſaid, hereditaments will not carry a fee ſimple; in *Cook* v. *Bullock, Cro. Jac.* 49, a mortgage to a deviſee, ſaid to be a revocation; *Perkins* v. *Walker,* 1 *Vern.* 97; *Harkneſs* v. *Bayley, Eaſter* Term, 1719, *Prec. in Chan.* 514, in this caſe a mortgage to a deviſee, was held to be a revocation of the will *in toto.*

The caſe was argued by Mr. *Price* for the plaintiff, and by the Attorney General Mr. *Thurlow,* the Solicitor General Mr. *Wedderburne,* and Mr. *Madocks,* for the deviſee.

Lord Chancellor.—The intention of the teſtator is evident, to have his debts paid by his executor. To pay them, he muſt be furniſhed with the means; he gives him all his eſtates, and after payment, makes him the reſiduary deviſee, and legatee. After making this will, he mortgages part of the eſtate. To whom? To the defendant his executor, by whom he had directed his debts to be paid; but this mortgage is ſaid to be a revocation of the will: It may be *quoad* the mortgage; I would then aſk in whom is the eſtate? The legal eſtate is in the defendant the mortgagee, under his mortgage. The equity of redemption is in him by the will. It cannot be ſaid, the equity of redemption did not paſs by it, and the will not being diſputed, the equity of redemption did not paſs to the heir. Therefore diſmiſs the bill.

Webſter

15 Dec. 1777. Lord Bathurſt C.

Webſter v. *Pawſon.*

A WITNESS going to ſea, was examined *de bene eſſe*, in order to make uſe of his evidence at law: Notice of trial being given, and the witneſs not being returned, his depoſition was ordered to be copied, and publiſhed by the Examiner; but he was not to publiſh any of the depoſitions of the other witneſſes.

20 Dec. 1777. Lord Bathurſt C.

Ex parte *Boſanquet.*

AN infant, mortgagee of lands in the iſland of *Grenada*, in the *Weſt Indies*, being found to be an infant mortgagee within the Statute of the 7th of Queen *Ann*, the report was confirmed, and he was ordered to convey.

25 Jan. 1778. Lord Bathurſt C.

Hunt v. *Prieſt.*

The mode of proceeding on examinations, *pro intereſſo ſuo.*

A PARTY had been examined under an order for the purpoſe, *pro intereſſo ſuo.* He applied and preſſed to have the merits determined upon a petition, which being oppoſed, as not agreeable to practice Lord *Bathurſt* C. directed me to lay before him, the mode of proceeding; in obedience to which, I ſubmitted a paper, of which the following is a copy:

'A party claiming an intereſt in eſtates ſequeſtered, 'or in the hands of a Receiver, an order is obtained upon

'upon notice of motion, to come in, and be examined 'pro intereſſo ſuo, wherein a time is to be limited for 'filing interrogatories.

'After the examination, the other ſide hath liberty 'to examine witneſſes, to falſify the examination, and 'a commiſſion of courſe iſſues, if neceſſary, wherein 'the claimant may join if he thinks fit; and the com-'miſſion, (if any), is returned. Publication paſſeth by 'order.

'Then an order is made to refer it to the Maſter, 'to look into the examination and depoſitions, and 'to certify, whether the claimant hath made out 'any, and what, intereſt in the premiſes, or in any, 'and what part thereof.

'The report the Maſter makes is ſet down to be 'heard for directions; and the Court pronounces a 'final order.

'Caſes proving the above mode, *Fawcett* v. *Fother-'gill*; *Francis Calvert* and others, claiming a mort-'gage for 1000 *l.* on the eſtates ſequeſtered, by order 'dated 18th *February* 1699, *entered Reg. Lib. A. fol.* '396, they were to come in, to be examined *pro inter-'eſſo ſuo*, and the plaintiff was to exhibit interrogato-'ries for that purpoſe.

'By an order dated 7th of *January* 1700, *entered* 'Reg. Lib. A. fol. 340, on the petition of the plaintiff, 'after ſtating, that the claimants had been examined, 'and the depoſitions returned, it was referred to the 'Maſter, to certify what proof the claimants had made 'of their pretended right.

'The Maſter made his report; the matter of the 'ſaid report came on to be heard, 8th *April* 1703, *en-*

'*tered*

Hunt v. *Prieſt.*

'*tered Reg. Lib. A. fol.* 206, when his Lordſhip or-
'dered the plaintiff to reply to the examination, and
'the examinant was to be at liberty to examine wit-
'neſſes touching his claim, and to take out a commiſ-
'ſion, wherein the plaintiff was to join, if he thought
'fit.

'Witneſſes having been examined, there was an or-
'der for ſetting the matter down to be heard on the
'report.

'The 26th *October* 1705, *entered Reg. Lib. A. fol.*
'101, the matter of the report, (by which the Maſter
'found the claimants to have really and *bonâ fide* paid
'400 *l.* and no more), came on to be argued. Upon
'debate of the matter, and hearing the exhibits, and
'the proof, taken in relation to the matter aforeſaid,
'his Lordſhip conceived the ſequeſtrators might re-
'deem the mortgage, and directed an account as to
'400 *l.*"

The above cauſe of *Hunt* v. *Prieſt*, being again brought on, after much litigation, his Lordſhip ſaid, he would adhere to the mode of proceeding, in the preceding caſes, and referred it to the Maſter, to ſee if the claimant had made out any, and what title to the premiſes claimed by him (*a*).

(*a*) See Cooper v. Thornton; Hamlyn v. Ley; and Bowles v. Parſons, ſupr.

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25 March 1778.

Norris v. *Norris.*

IF a mortgagee exhauſts the perſonal eſtate, the legatees ſhall ſtand in his place.

Field

Field v. *Moſtin.*

27 March 1778.

THE teſtatrix in this cauſe being indebted to Mrs. *Hutchinſon*, in 141 *l.* made her will, and thereby gave to the ſaid Mrs. *Hutchinſon*, the ſum of 500 *l.*; ſhe alſo gave a legacy of 400 *l.* to a charity, and the *reſidue* of her perſonal *eſtate* to pay her debts and legacies; if the perſonal eſtate ſhould not be ſufficient, the deficiency to be raiſed by mortgage or ſale of the real eſtate.

A legacy though greater than a debt due to the legatee, held not to be a ſatisfaction of the debt.

The queſtion in the cauſe was, whether the legacy to Mrs. *Hutchinſon*, was not a ſatisfaction of the debt to her. *Chauncey*'s caſe, 1717 (*a*), was cited.

(*a*) 1 P. Wms. 408.

Lord Chancellor held that it was evident by the will ſhe meant both debts, and legacies ſhould be paid, and therefore declared, the legacies were not to be conſidered as a ſatisfaction of the debt. As to the legacy to the charity, the perſonal eſtate being deficient to pay the whole, the queſtion was, whether it ſhould be firſt applied in payment of thoſe legacies: But his Lordſhip ſaid he would not ſet up a new rule, and cited the Attorney General v. *Graves* (*b*), 4th *Nov.* 1752; the Attorney General v. *Tomkins* (*c*), 4th *March* 1754; *Arnold* v. *Chapman*, 1 *Veſey*, 108; the Attorney General v. *Jeanes*, *Hilary*, 1737 (*d*).

(*b*) Ambl. 155.
(*c*) Ambl. 216.
(*d*) 1 Atk. 355.

Parry

20 May 1778.

Parry v. *Carwarden.*

In a conveyance, blood is no conſideration within the Stat. of 27 Eliz.

IN 1752, *John Carwarden* the huſband of *Magdalen*, and the father of the defendant *Benjamin Carwarden*, being ſeiſed in fee of a real eſtate, by his will deviſed an eſtate to *Magdalen* in ſatisfaction of dower.

She entered, and enjoyed the eſtate till her death in 1776.

Benjamin the ſon, inſtituted a ſuit, thereby impeaching the will. An iſſue was directed, and a verdict found in favour of the will.

On the 21ſt of *Auguſt* 1773, *Magdalen* entered into an agreement with the plaintiff, for the ſale of the eſtate deviſed to her, and 10 *l.* were paid down, and 1800*l.* were to be paid on the execution of the conveyance.

As ſoon as the contract was known, *Benjamin* the ſon ſet up a voluntary conveyance from his mother by indentures of leaſe and releaſe, of the 23d and 24th of *April* 1763, by which, after reſerving a life eſtate, ſhe conveys the fee to her ſon.

She inſtituted a ſuit to ſet aſide the ſame, but died before the cauſe was at iſſue.

The plaintiff's bill was to ſet the deeds aſide, as being fraudulent, and without conſideration. And he inſiſted they were ſo, within the Statute of 27 *Eliz.*

The caſes of *Redham* v. *Beamont*, 3 *Ch. Rep.*; and *Compton* v. *Baſſet*. were cited, to ſhew that blood is no conſideration within that Statute.

The Lord Chancellor declared the plaintiff was entitled to a ſpecific performance of the agreement, and that the indentures of leaſe, and releaſe, of the 23d and

and 24th of *Auguſt* 1773, were void againſt the plaintiff, and were not to ſtand in his way. *Perry* v. *Carwarden.*

Cartwright v. *Cartwright.*

2 July 1778.

THE heir at law an adult, by his anſwer, admits the will, he afterwards dies, and the ſuit is revived againſt his *heir at law* an infant; the admiſſion of the deceaſed heir at law, will not bind the infant, and the will muſt be proved *per teſtes* againſt him. The queſtion was made at the hearing of this cauſe, which was ordered to ſtand over, with liberty for the plaintiff to exhibit interrogatories to prove the will and codicils (*a*).

Infant heir not bound by the admiſſion in the deceaſed heir's anſwer, of the will of the teſtator.

(*a*) Sleeman v. Sleeman, 3 March 1772. S.P.

Lord *Sandys* v. *Sibthorpe.*

4 July 1778.

ON a queſtion on the diſpoſition by will of ſome New River ſhares; it was agreed that New River ſhares were real property, and deſcendible to the heir.

Brown v. *Lee.*

21 July 1778.

UPON a bill of revivor being filed, the Solicitor General Mr. *Wedderburne*, moved ſpecially, on an affidavit of the defendant's abſconding, that ſervice of a ſubpœna merely to revive, an anſwer not being

Service of a ſubpœna to revive on the defendant's clerk in court in the original cauſe, refuſed.

Brown v. *Lee.*

wanted, on his clerk in the original cauſe, might be deemed good ſervice on the defendant. It was held to be improper, and refuſed; and it was ſaid, the plaintiff muſt purſue the act for rendering proceſs effectual againſt thoſe that abſcond.

[Note.—This cauſe was afterwards heard on the bill of revivor in 1782; and the original ſuit and proceedings decreed to be revived. J. D.]

30 Nov. 1778.

Lee v. *Warner.*

A ſimilar application as in the above caſe, and refuſed after ſolemn debate, and great conſideration.

A DECREE in the original cauſe for an account. In the courſe of proceedings before the Maſter, it was evident a balance would be due from the defendant; he went abroad. Afterwards the ſuit abated by the death of the plaintiff: his repreſentative filed a bill againſt the defendant, who was a defendant in the original cauſe, merely to revive. The defendant not being to be found, the plaintiff preſented a petition to Sir *Thomas Sewel* M. R. praying, that ſervice of a ſubpœna to revive on the ſaid defendant's clerk in Court in the original cauſe, might be deemed good ſervice.

His Honour as he expreſſed it, had not the leaſt doubt.

But a paper having been left with the petition, ſigned by ſome of the clerks in Court, as a kind of certificate, of their opinion that it was the practice, his Honour ordered an attendance upon the petition, and it was this day argued (*a*).

(*a*) 30 Dec. 1778.

His Honour continued of the ſame opinion, as when the petition was preſented. He obſerved, that a bill of

of revivor was a diſtinct record from the original bill, and was as much a new bill as any other bill that was filed; that the Act of 5th of *Geo.* 2. had remedied the inconvenience, when the defendant abſconded to avoid being ſerved, and therefore that the plaintiff muſt purſue the courſe preſcribed by that act.

That it did not follow, becauſe the defendant employed a clerk in Court in one ſuit, he was a clerk in Court in every ſuit; that where a clerk in Court, enters an appearance for a defendant, he doth it under a proper authority: were he to do it without, he would act very imprudently.

His Honour however, ſuſpended his directions, and ſaid, if the plaintiff could produce any precedent, and could move it upon any ſpecial circumſtances, he would hear him.

[But ſuppoſing the Court were to grant the order, and the clerk in court were ſerved: this Court could not compel the clerk in court to appear, the order, not being that he ſhall appear, but only that ſervice on him, might be deemed good ſervice, and if the clerk in court ſhould not appear, the defendant being defendant then comes within that part of the act, which provides for the caſe of a ſerved, and refuſing to appear. J. D.]

On this day (*a*), his Honour ſent for the Regiſter, and told him, that he had thoroughly conſidered the petition; that the more he thought of the application, the more he was confirmed in his opinion of the impropriety of it, and directed him to enter a minute diſmiſſing the petition.

(*a*) 10 Dec. 1778.

Lord *Shipbrook* v. Lord *Hinchinbrook*.

11 Nov. 1778.

LORD *Thurlow* C., upon the ſame grounds, as in the caſe of *Roach* v. *Garvan*, reported ſupr. 88. referred it to the Maſter, to appoint a guardian in the

Lord *Shipbrook* v. Lord *Hinchinbrook.*

room of Mrs. *Donaldſon* the infant's mother; and ordered, that ſhe ſhould continue with Mrs. *Donaldſon*, until further order, and that Mrs. *Donaldſon* ſhould be reſtrained from giving her conſent to the marriage of the infant, without leave of the court; and that the infant ſhould not be married without leave of the court; the order alſo reſtricted her from receiving any letters or meſſages, &c. from one *Leoni*, a jew ſinger (*a*).

(*a*) Lord Thurlow C. made a ſimilar order in Hodgſon v. Watſon, 11 April 1789.

17 & 18 Dec. 1778.

Stanyford v. *Tudor.*

Exceptions do not lie to a maſter's certificate of his having ſettled interrogatories.

THE Maſter having certified he had ſettled interrogatories for the examination of the defendant, the defendant took exceptions to the report. The ſaid exceptions came on to be argued on the 17th of *December*, when it was argued in ſupport of them, that the interrogatories led to matters not in iſſue, and that ſhould an examination be taken under the interrogatories, as ſettled by the Maſter, the ſame would be of an enormous length. On the other ſide it was argued, that excepting to a Maſter's certificate of his having ſettled interrogatories, was a new practice, and not warranted by precedent; and that the Maſter was the proper judge of the propriety of the interrogatories to the matters as to which he was to examine.

Lord *Thurlow* C. directed the Regiſter to attend Sir *Thomas Sewel*, the Maſter of the Rolls, on the ſubject. His Honour was clear the Maſter muſt ſettle the

Stamford v. *Tudor.*

the interrogatories; that the party was to put in ſuch examination as he thought proper. If not ſufficient, it would be referred, and the Maſter would report his opinion, and to this report either ſide might take exceptions; and the Court, then having the interrogatories and examinations before it, would determine whether the examination was ſufficient, or not. On making known to his Lordſhip what his Honour had ſaid, his Lordſhip was clear, this was the proper courſe of proceeding, and that it was not proper to except in the preſent ſtage of the cauſe; and therefore overruled the exceptions.

Axe v. *Clarke.*

23 April 1779.

Attaching and receiving money levied by the ſheriff, though levied before the bill was filed, a breach of the injunction: *aliter* had the ſheriff paid it voluntarily.

THE defendant had brought his action, and obtained judgment, and had taken out execution, and the ſheriff had levied 328 *l.* 10 *s.*

The plaintiff filed his bill, amongſt other things, for an injunction, and obtained the common order for an injunction, with liberty to proceed to trial, and to obtain judgment, but with a ſtay of execution.

The defendant was ſerved with a writ of injunction; but notwithſtanding attached the ſheriff, and received the money levied.

The plaintiff moved on the 23d of *March* laſt, that the defendant might repay the money, and ſtand committed for breach of the injunction.

A doubt aroſe, whether, as the money was levied before the bill was filed, it was a breach of the injunction, it being an execution executed.

Axe v. *Clarke.*

Upon the matter being moved again this day, Lord *Thurlow* C. was clearly of opinion, that the ruling of the ſheriff to pay the money was a breach of the injunction; and ordered the money to be repaid to the ſheriff; but ſaid it would have been different, had the ſheriff paid the money voluntarily.

22d April 1779.

Waring v. *Hotham.*

On a bill to ſettle the boundaries of two pariſhes, the matter held to be at law.

THIS bill was to ſettle the boundaries of two adjoining pariſhes, namely, St. *Luke's Old Street*, and St. *Leonard's Shoreditch*.

Lord *Thurlow* C., after hearing Mr. *Madocks*, ſaid the matter was at law, where it could be eaſily determined; that this Court would not entertain ſuch ſuits, and therefore diſmiſſed the bill with coſts.

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28 April 1779.

Pemby v. *Mathew.*

There being but one witneſs againſt an anſwer, the court directed an iſſue.

THE bill was to compel the defendant to execute a bond to indemnify the plaintiff againſt covenants in a leaſe; the defendant by his anſwer denied the agreement ſo to do; the depoſitions of *Luke Hoggart*, a witneſs, examined by the plaintiff, were read; and *Bate* v. *Shephard* was cited: but there being only one witneſs againſt the oath of the defendant, Lord *Thurlow* C. ſaid, he would not determine on the credibility of the witneſs, but directed an iſſue.

Ayles

Aylet v. *Hill.*

29 April 1779.

A MORTGAGEE foreclofes, and, having a bond as a collateral ſecurity, brings an action on the bond.

A Mortgagee may ſue at law on the bond, after a decree of foreclofure.

Motion to ſtay proceedings at law on the bond.

The Lord Chancellor held that the mortgagee might proceed at law on his bond, notwithſtanding he had obtained a decree of foreclofure, and denied the motion.

[But *Qu.* having gotten the pledge, if he could do it, till the pledge was *bonâ fide* ſold, and it was ſeen whether it was deficient to anſwer the whole of the debt? J. D.]

Godwin v. *Munday.*

11 May 1779.

JOHN *Munday*, by his will having directed his debts, and funeral expences to be paid, proceeds thus:

'Alſo all my lands, leaſehold and perſonal eſtate 'whatſoever, I give to my wife for life, if ſhe ſo long 'continues unmarried.'

A deviſe of lands in fee to B. after the death or marriage of the teſtator's widow, provided that B. pay 400 l. to C. after the death or marriage of the widow; C. ſurvives the teſtator, but dies in the life-time of the widow: the legacy doth not ſink.

After the death, or the marriage of the wife, the teſtator gives his lands at *Eaſtow* to his ſon *Stephen*, and his heirs, and then proceeds:

'I alſo give to my ſon *James* my land called *Buſhy* 'Common, and the land held by leaſe of *Henry Sey-* 'mour, to him and his heirs for ever, after the death, 'or marriage of my wife, with this proviſo, that my 'ſon *James* ſhall pay to *Mary* the wife of the plaintiff 'Godwin 100 *l.* within one year after my wife's death, 'or marriage.'

Godwin v. *Munday.*

Mary the wife of the plaintiff died in the life-time of the teſtator's widow.

And, on the death of the widow, *James* the ſon, came into poſſeſſion of the eſtate deviſed to him upon that event.

The plaintiff, as adminiſtrator of *Mary* his late wife, brought his bill to have the ſaid legacy of 100 *l.* given to his ſaid wife, raiſed, and paid, inſiſting that it was veſted, and tranſmiſſible.

The defendant, on the contrary, contended, that as it was to be paid out of land, and as the legatee died before the time it was payable by the will, it was not to be raiſed.

The ſame arguments were gone into as in the caſe of *Pawſey* v. *Edgar* ſupr. 531; and all the caſes that were then cited, were again cited, with the addition of the caſes of *Clarke* v. *Roſs* ſupr. 529; and *Bacon* v. *Clark*, *Prec. in Chan.* 244; *Watſon* v. *Marſhall*, 26th *Feb.* 1774; and *Morgan* v. *Gardiner* in the Exchequer (*a*).

(*a*) 1 Bro. C. C. 393.

It ſtood for judgment till this day, when the Lord Chancellor directed the legacy to be raiſed and paid.

15 May 1779.

Wigg v. *Tiler.*

The great ſeal hath the care of lunatics under a ſpecial appointment, and acts as a commiſſioner.

THE lunatic's real eſtate had been ſold under an act of parliament, and the money ariſing from it paid into the Bank, and laid out in Bank Annuities in the name of the Accountant General, in the matter of the lunacy.

The

The lunatic died; and, on application to have the money divided, Lord *Bathurſt* C. ordered the Maſter to enquire who were the heirs at law, and next of kin the lunatic.

The maſter having made his report, the heirs at law and next of kin applied to Lord *Thurlow* C. to have the funds transferred; but his Lordſhip was of opinion, that a bill ſhould be filed for the purpoſe of taking an account of his debts, and adminiſtering his effects.

The plaintiffs accordingly filed their bill to have the funds transferred, and paid to the heirs at law, and next of kin.

On the 15th *May* 1779, the cauſe came on to be heard, but his Lordſhip was of opinion, that the report in the lunacy was not a ſufficient authority on which to ground a decree; for, obſerved his Lordſhip, the Great Seal in reſpect of lunacy, acts as a commiſſioner under a ſignet to take care of lunatics, and it is not of neceſſity that the Great Seal hath that appointment.

There was an inſtance, he ſaid, where the Lord High Treaſurer had the warrant, conſequently the matter could not be conſidered as a *res judicata*; and therefore he ordered the Maſter to enquire who were the heirs at law, and next of kin of the lunatic, and to advertiſe in the Gazette, and other papers, for them to come in and prove their affinity by a time, or to be excluded, and to make his report in the cauſe.

Roberts

22 May 1779.
1 Bro. C. C. 56.
S. C.

Roberts v. *Hartly.*

After time to answer, a plea put in, held good.

THE defendant after obtaining two orders to answer, put in a plea. An application was made to suppress the plea, and that an attachment might issue.

Lord Chancellor.—I will make no order for suppressing the plea; I conceive a plea to be an answer. It is upon oath.

Trin. 1779.
1 Bro. C. C. 92.
S. C.

Lord *Irnham* v. *Child.*

Parol evidence to prove the intention of a party in executing a deed, rejected.

BILL to be relieved against two annuities, and to be let in to redeem them, upon the grounds that although there were no proviso of redemption, *yet that it was meant*, and so understood.

At the hearing of the cause, parol evidence was offered to prove the intention of the parties.

The cases cited were, Lord *Maxwell* v. Lord *Montacute*, 1 *Eq. Cas. Ab.* 20; *Harvey* v. *Harvey*, 2 *Eq. Ca. Abr.* 669; *Hutchins* v. *Lee*, 1 *Atkins*, 447; *Walker* v. *Walker*, 2 *Atkins*, 98; *Fitzgerald* v. Lord *Fauconberg*, in *Fitz Gibbon*, fol. 2; *Pitcarn* v. *Ogbourne*(*a*); *Lock* v. *Colnbrook*, 1767; *Phillips* v. Duke of *Buckingham*, 1 *Vern.* 227; *Baker* v. *Wind*, 1 *Ves.* 160.

(*a*) 2 Vef. 375.

Lord Chancellor had no doubt of the question, whether under the Statute of Frauds, or on the clear and acknowledged principles of law, that the evidence was inadmissible; and therefore rejected it.

Murray

Murray v. *Frank.*

2 Seal 1779.

APPLICATION that *Naphtali Frank* may, in ſeven days, procure a new grant of a committeeſhip, or that the Maſter may appoint a guardian.

Lord *Thurlow* C.—You muſt apply to the Great Seal to appoint a committee; there is no inſtance where a party hath been found a lunatic under a commiſſion of enquiry, in which this Court hath interfered.

Clough v. *Croſs.*

23 June 1779. Lord Thurlow C.

The ſheriff of Cheſter refuſing to make any return to the mandate of the chamberlain of Cheſter upon an attachment iſſued out of Chancery againſt a defendant to be executed, ordered to do it by a given time.

THE defendant who reſided in the county palatine of *Cheſter*, being in contempt for want of his anſwer to a bill filed againſt him in Chancery, an attachment iſſued againſt him, directed to the Chamberlain of the County Palatine of *Cheſter*, or his deputy there, commanding him to iſſue a writ under the ſeal of the County Palatine of *Cheſter*, to the ſheriff of the City of *Cheſter*, to attach and bring the ſaid defendant into this Court on or before a given day, to anſwer his ſaid contempt. The ſaid writ not being returned, another order was made on the 14th of *December* laſt, directing the ſaid Chamberlain, or his deputy, forthwith to return the ſaid writ; the order was ſerved, and the Chamberlain having *returned the writ* with the following anſwer, "by virtue of the writ to me directed, I have by another writ under the ſeal of the County Palatine of *Cheſter*,

Clough v. *Croſs.*

directed the ſheriff within written, as within it is commanded me, which ſaid ſheriff hath made me no anſwer." Upon this the plaintiff moved on the 23d of *January* 1779, that this ſheriff might *make a return on the writ*; but this could not be, as the writ was returned in Court; and the matter being novel, his Lordſhip was in doubt how to act, whether to proceed againſt the Chamberlain only to oblige him to compel the ſheriff to pay obedience to his mandate, or to proceed againſt the ſheriff in the firſt inſtance; for if the Court had not juriſdiction to execute it's writ in the County Palatine, but only direct it to the Chamberlain in order for him to iſſue his mandate, that the effect of it might be obſerved; he did not ſee how he could make any order upon the ſheriff; and to make an order the Court could not enforce, would be leſſening it's dignity.

His Lordſhip therefore directed me to get what information I could on the ſubject, and to attend Mr. Baron *Perrin* who was Vice-Chamberlain of *Cheſter*, which I did, but did not meet with two perſons that agreed in opinion; however, I procured the following notes and caſe, which I laid before his Lordſhip.

Seddon et al. v. *Curghey*, 11 *June* 1765. The plaintiffs ſued out a *teſtatum ſcire facias* againſt the defendant directed to the Chancellor of the County Palatine of *Lancaſter*, or to his lieutenant or deputy, the Chancellor made out his precept directed to the ſheriff of the county, who, being called upon, refuſed, or neglected to return the precept. The queſtion was, how the plaintiffs were to proceed, whether by calling on the ſheriff in open court, or to move that the Chancellor might return the writ of *ſcire facias*.

Upon conſidering the matter, the latter method was taken, and the following order was made: *Clough v. Croſs.*

Lord Chancellor, 11 *June* 1765, between *Samuel Seddon*, *Charles Deaves*, and *John Moore*, Eſq. plaintiffs, and *Belby Curghey*, defendant.

Upon motion, &c. it was alleged, that a *teſtatum ſcire facias* hath been iſſued under the Great Seal of *Great Britain* againſt the defendant, directed to the Chancellor of the County Palatine of *Lancaſter*, or to his lieutenant or deputy there, returnable in fifteen days from the firſt day of *Eaſter* Term now laſt paſt; and that no return hath been yet made thereof. It was therefore prayed, that the Chancellor of the ſaid County Palatine of *Lancaſter*, or his lieutenant or deputy there, may return the ſaid writ; which is ordered accordingly.

This matter was not further proſecuted; but it was agreed, that when the Chancellor had made his return, the next ſtep to be taken muſt have been againſt the ſheriff, praying that he might return the precept.

Three orders are ſaid to be neceſſary to compel the ſheriff to return the writ:

Firſt, an order that he do return it.

Secondly, that he do return it in days after notice of the order, or ſtand committed.

Thirdly, that he do ſtand committed.

Note, theſe may be orders on the equity ſide.

And note, no orders on the plea ſide are to be made out of Term.

Rule in the court of King's Bench to compel the ſheriff to return a writ.

A. v. *B.* It is ordered, that the Chancellor of the County Palatine of *Lancaſter* ſhall, within ſix days next

Clough v. *Croſs.*

next after notice of this rule to be given to him, or his deputy there, peremptorily return the writ of iſſued between the parties.

Upon which the chancellor returned that he hath ſent his mandate to the ſheriff who hath not returned the ſame; and thereupon another rule goes directed to the ſheriff in the following form.

"It is ordered, that the ſheriff of the County Palatine of *Lancaſter* ſhall, within ſix days after notice of this rule to be be given to his under-ſheriff, peremptorily return the mandate directed to him by the Chancellor of the ſaid County Palatine upon the writ of iſſued between the ſaid parties."

The Lord Chancellor having conſidered the above papers, furniſhed by Mr. *Deaves* and Mr. *Cooper*, and having talked with Lord *Mansfield*, directed me to draw an order agreeable to the rule made by the Court of King's Bench.

An order was accordingly drawn, following the words of it; and the ſheriff, having been ſerved with it, he returned the Chamberlain's mandate with a *cepi corpus*.

And on the 9th of *July* 1779, an order was made for the meſſenger to go, and bring up the priſoner.

Bullen v. *Butcher.*

30 June 1779.

Application to diſcharge an order for the plaintiff to make his election upon the ground that the matters for which he was unconnected.

THE common order was made for the plaintiff to make an election upon the uſual allegation that he was proſecuting the defendant both in this Court, and at law, for one and the ſame matter.

proceeding againſt the defendant in this Court and at law were diſtinct and

Application

Application on the above day to diſcharge the order, for that it was obtained upon a falſe ſuggeſtion, the matters for which the plaintiff was proceeding againſt the defendant at law, being diſtinct and unconnected with the matter in this ſuit, and prayed that it might be referred to a Maſter to ſee if the proceedings of the plaintiff againſt the defendant at law and in this Court, were for the ſame matter.

The Lord Chancellor's idea was, that if the matter for which the plaintiff proceeded at law was diſtinct from the matter in this Court, the order did not reſtrain him, and he had only to prove it, when complaint was made of his breach of the order; and therefore, at firſt, his Lordſhip denied the motion; but, being told there were many inſtances of ſimilar applications being granted, he directed the time for the plaintiff's making his election to be enlarged till further order, and referred it to a Maſter to ſee if the proceedings of the plaintiff againſt the defendant in this Court, and at law were for the ſame matter, and the Maſter to ſtate the ſame with his opinion; and after the report, further order to be made; but his Lordſhip, at the ſame time, directed me to ſee the inſtances that had been mentioned.

Not an inſtance having been produced, though I deſired the parties to bring me one, and not having been able to find one, I acquainted the Lord Chancellor of it; and he thereupon ordered me not to draw up the order he had before made; but by conſent, the plaintiff was to proceed to trial of the action brought by him with ſtay of execution.

Martha

30 June & 1 July 1779.
1 Bro. C. C. 16
S. C.

Martha Hulme, widow, - - Plaintiff.

Richard Tenant and *Frances* his wife, and *Thomas Watſon*, a truſtee in the marriage ſettlement of the defendants, - - - - } Defendants.

Bill againſt huſband and wife and the truſtee under their marriage ſettlement to be paid a bond in which the wife joined for the huſband's debt, ſhe having ſeparate property.

BILL againſt the defendants, the huſband and wife, to be paid a bond debt due from the wife, for money lent to the huſband, the wife having ſeparate property.

Grigby v. *Cox*, 1 *Ves.* 517, 21ſt *November* 1748; *Peacock* v. *Monk*, 2 *Ves.* 190, 24th *October* 1748; lib. B. fol. 126, were cited.

The bill was diſmiſſed.

The cauſe was afterwards reheard before Lord *Thurlow* C., when the following additional caſes were cited:

Norton v. *Turville*, 2 *P. Wms.* 144; *Powlet* v. *Delaval*, 2 *Ves.* 663, 28th *July* 1755, lib. B. 480; *Hearl* v. *Greenback*, 1 *Ves.* 298, and in 3 *Atk.* 695.

Mr. Attorney General for the defendants.—The huſband the original debtor is in diſtreſs for money; his wife hath a ſeparate property ſubject to her appointment; he prevails on her to join with him in a bond. The objection is, that the bond, as a bond of the wife, is void at law; but in order to give it effect the plaintiff would have it conſidered as an appointment, and under the *dictum* in the caſe of *Peacock* v. *Monk*, that the bond is to be taken as an agreement. The *dictum* is, however, queſtionable.

It was ſaid on the part of the plaintiff, that in *Bell* v. Commiſſary *Hyde* in *Gilbert's Rep.* 83, and in *Chan. Prec.* 328, it is held that proceſs will iſſue againſt a wife.

North

In *North* v. *Turville*, 2 *P. Wms.* 144, it was held that a feme covert coming before Maſter and conſenting that her ſeparate eſtate ſhall be applied, ſhall be bound by it.

So in *Briſcoe* v. *Kennedy* by Sir *Thomas Clark* M. R. 21ſt *July* 1762, Reg. Lib. B. fol. 517.

But in *Machellan* v. *Stonehouſe*, annuities were ſettled to the uſe of a wife, and truſtees appointed for her ſeparate uſe. The plaintiff bought the wife's intereſt, and filed a bill to have annuities transferred by the truſtees to the Accountant General, and to have the intereſt paid to him. The wife inſiſted that it was not done with her conſent. There was evidence that both the huſband, and wife were ſatisfied. Nothing appeared fraudulent, yet the Court would not confirm it.

Lord Chancellor.—According to the idea I entertain of the caſe, doubts ariſe upon the form of the relief to be given.

The bill is brought by an obligee in a bond againſt the huſband, and wife joint obligors, and their truſtees, to recover 180 *l.* out of the ſeparate eſtate of the wife.

The queſtion is, what ſort of execution the Court will award againſt the ſeparate property of the wife. The ſeparate property is a real eſtate veſted in truſtees to convey to the appointment of the wife by deed, or will; and in default of ſuch appointment as to one part, to the uſe of *Francis Wright*; as to the other part of the real eſtate, to be ſold, and out of the money to ariſe by the ſale, 1000 *l.* to be retained, and to be laid out at intereſt, the intereſt to be for the uſe of the wife, and the principal ſubject to her appointment.

Hulme v. *Tenant* et al.

(a) 3 Veſ. 127.

In the argument in this caſe, what is laid down in the caſe of *Peacock* v. *Monk* (a) is clear, that a feme covert acting with reſpect to her ſeparate property, is to all intents to be conſidered as acting as a feme ſole.

See *Allen* v. *Papworth*, 1 *Veſ.* 163, 23d *November* 1748, Reg. Lib. A. fol. 714; *Grigby* v. *Cox*, 1 *Veſ.* 517, 21ſt *July* 1750, Reg. Lib. A. fol. 647.

In ſuch caſes it is impoſſible to ſay a feme ſole is not bound.

The queſtion ariſing here is a little beyond it, namely, how far her general perſonal engagement ſhall be executed out of her general perſonal property?

If ſhe had contracted how far her ſeparate property ſhould be applied to this or that purpoſe, I can have no doubt but the Court would have enforced it.

A general engagement by the wife, I am clear, will not bind, and I know no caſe where it hath been carried ſo far, as to direct a real eſtate of the wife to be ſold, or conveyed, or that a decree hath been enforced againſt a wife by a ſequeſtration, though againſt her truſtee it may.

But the perſonal eſtate of the wife and the rents and profits of her real eſtate will, when they ariſe, be perſonal eſtate.

Therefore refer it to the Maſter to take an account of the rents and profits of the leaſehold eſtates which were in mortgage to

received by the defendant *Watſon*, or by any other perſon by his order, or for his uſe; and let the Maſter ſtate the nature of the intereſt the ſaid defendant *Watſon* hath in the ſaid mortgaged eſtates; and for the better taking the account and diſcovery

of

of the matters aforelaid (the uſual directions); and reſerve coſts and further directions until after report, and liberty to apply. *Hulme* v. *Tenant* et al.

G. M. Selwyn.

1 July 1779.

APPLICATION to ſuppreſs depoſitions for irregularity, becauſe the ſolicitor was one of the commiſſioners:

Depoſitions ſuppreſſed, becauſe plaintiff's ſolicitor was one of the commiſſioners.

A ſolicitor cannot act as a commiſſioner.

1 *Vern.* 369; 2 *Ch. Cas.* 69; *Practical Reg.* 91.

Lord Chancellor.—Let the depoſitions be ſuppreſſed, and enlarge publication, and let there be a new commiſſioner.

Mayer v. *Gowland.*
Gowland v. *Mayer.*

13 Nov. 1779. Lord Thurlow C.

BILL in the original cauſe was for an account of the eſtate of *John Gowland*, to have the reſidue paid to the plaintiff *John* and the defendant *Thomas Mayer* according to an agreement between them; to have a contract the teſtator had entered into with the defendant *Dinely* for the ſale of an eſtate to him completed; and to have the purchaſe money conſidered as perſonal eſtate.

Queſtion, whether a contract by teſtator after his will for ſale of an eſtate thereby deviſed, is a revocation of will as to that deviſe, and deſcends to heirs or whether the contract is to be performed and the purchaſe money conſidered as perſonal eſtate? held to be part of perſonal eſtate.

Lord Chancellor.—The teſtator was ſeiſed in fee of a manor and farm in *Suſſex* called *Mayes*.

On the 8th of *March* 1775 he made his will, and thereby deviſed *Mayes* farm to *Ralph Gowland* for

Mayer v. Gowland, et è contra.

life; remainder to *Thomas Gowland* the elder for life; remainder to *Thomas Gowland* the younger in fee; and deviſes his leaſehold eſtate, and alſo his jewels uſed or worn by his wife, to a truſtee to permit his wife to uſe and enjoy the above particulars during her widowhood; and, on her death, or ſecond marriage, to go as part of his perſonal eſtate.

He alſo gives two long annuities he was then poſſeſſed of to *John Shirly* and *Ann Shirly*; theſe annuities the teſtator ſold, and a faint claim was attempted to be made to have them reinſtated, but it was ſoon dropt.

The teſtator alſo gave 500 *l.* a year to his wife for her life, and a power of diſpoſing of 2000 *l.*; and, after other legacies, gave the reſidue to the plaintiff *John Mayer*: he and *Thomas Mayer*, as it is ſaid, have entered into an agreement to divide the reſidue.

The teſtator, after making his will, entered into a contract with the defendant *Dinely* to ſell to him *Mayes* farm for 1500 *l.*, in which agreement he averred it was not ſubject to any leaſe; and if *Baniſter* the tenant ſhould make out a title to any leaſe, the agreement was to be void.

The bill in the croſs cauſe is, by the deviſee of *Mayes* farm, to eſtabliſh the will as to that deviſe; and by *Baniſter* the tenant, to have a leaſe according to an agreement he ſets up, but he cannot make out.

The defendant the widow inſiſts that the jewels, of which the uſe is given to her by the will for her life, are her paraphernalia, and therefore do not paſs by the will; if ſhe perſiſts in the claim, which it doth

ſeem

ſeem to be her intereſt to do, ſhe muſt be put to her election. *Mayer* v. *Gowland*, et è contra.

The principal queſtion in this cauſe ariſes on the eſtate called *Mayes* farm, deviſed by the will, and which the teſtator afterwards contracted to ſell: by the heirs at law it is inſiſted, that the agreement with *Dinely*, though not carried into execution, is a revocation of the will as to that deviſe, and therefore the eſtate deſcended: By the deviſee of that eſtate it is inſiſted, that if *Baniſter's* title to a leaſe is eſtabliſhed, the agreement with *Dinely* is void, therefore no revocation; that a void agreement is not a declaration of truſt, and therefore will not prevent the deviſe taking effect: And by the reſiduary legatees it is inſiſted, that the teſtator having contracted, it is evident, he meant to turn it into perſonalty, and as ſuch they are entitled to it.

And I am of opinion that the agreement is good, that it ought to be carried into execution; and of conſequence, the money ariſing from the ſale is to be conſidered as perſonal eſtate.

Caſes cited: *Cotter* v. *Layer*, 2 *P.Wms.* 623; *Roper* v. *Radcliffe* (*a*); *Howard* v. *Howard*; *Glazier* v. *Glazier*, in the King's Bench, in which it was held that a covenant to convey in future is not a revocation of a will. *Beard* v. *Beard*, 3 *Atk.* 72.

(*a*) 2 Eq. Ca. Abr. 771.

21 Dec. 1779.

Breedon v. *Vaughan.*

Lord Chancellor.

Bill by husband and wife, the husband dies, the wife is not bound to profecute.

MOTION to diſcharge an order of the 20th *June* 1778.

Bill by husband and wife, the husband dies, and the wife not proceeding, the bill is diſmiſſed with coſts; which order for diſmiſſion ſhe now prays to have diſcharged. *Parry* v. *Juxon*, *Chan. Rep.* 40. in 1669; and in the *Practical Regiſter* under the head of *Revivor*.

If in her right, *qu.* doth it not ſurvive? J. D.

The queſtion is, whether the wife is bound to proſecute a ſuit in which ſhe is named a plaintiff by her huſband; the wife probably might not know any thing of the ſuit; during coverture ſhe was under the controul, and influence of her huſband: Her huſband being dead, ſhe may judge for herſelf; if a man and wife put in a joint anſwer, and ſhe, being an heir, admits the will, that admiſſion will not bind her: why? becauſe it is ſuppoſed to be her huſband's anſwer; the will muſt be proved *per teſtes*. It is analogous to proceedings at law in the action by huſband and wife, and the huſband dies.

But ſuppoſe it ſhould, the coſts were her huſband's debt, will the court make her pay them? J. D.

4 March 1780.

Akeroid v. *Smithſon.*

Real eſtate given an executor in truſt to ſell and to make one maſs with the perſonal eſtate, and the reſidue to be divided amongſt particular legatees in proportion to their legacies; two of the legatees died in the teſtator's life-time, ſuch proportion as they would thereby have been entitled to had they lived, which aroſe from the real eſtate, held, *on appeal*, to reſult for the benefit of the heir at law.

CHRISTOPHER Holworth, by will dated 4th *April* 1774, gave ſeveral legacies to perſons therein named, and gave and deviſed all his real eſtates therein mentioned, and all his perſonal eſtate to the defendants *Joſhua Smithſon* and *Henry Ibetſon*, and their heirs, execu-

tors,

tors, adminiſtrators, and aſſigns, in truſt to ſell, and convert into money, and by and out of the money to ariſe from the ſale, to pay all his debts, funeral expences, and legacies; and after payment thereof, and retaining 50*l.* each for their trouble, if there ſhould be any ſurplus, after the ſame was aſcertained, to pay the ſame unto *Thomas Whitaker*, *James Roberts*, *William Roberts*, *Grace Ogle*, *George Ogle*, *Ann* and *Phebe Ogle*, *Joſeph Siarr*, *Hancote Cloſe*, *William Hawkſworth*, *Mary Bracklebarr*, *Mary Roſe*, and *Joſhua Marſhall*, defendants in the cauſe, and *Benjamin White* and *Mary Molineux*, who died in the teſtator's life-time, to each of whom he had given legacies, in proportion to their ſeveral legacies.

The teſtator died 20th *March* 1775: his executors proved the will, poſſeſſed his perſonal eſtate, and entered on his real eſtate, and ſold it.

Benjamin White and *Mary Molineux*, two of the legatees, died in the teſtator's life-time, whereby their legacies, and all other their ſhares in the reſidue, became lapſed. The plaintiffs the next of kin filed their bill to have the ſaid two legacies and proportional ſhares of the ſurplus conſidered as part of the teſtator's perſonal eſtate undiſpoſed, and to belong to them as the next of kin of the teſtator.

The defendants, the reſiduary legatees, claimed the lapſed legacies, and ſhares, as ſinking into and making part of the general reſidue.

The heir at law claimed ſuch part of the ſaid legacies, and proportion of the ſurplus as aroſe from the real eſtate, inſiſting, the ſame was to be conſidered as real eſtate.

Upon hearing the cauſe the 10th of *July* 1778, before Sir *Thomas Sewel* M. R. his Honour declared,

Akeroid v. *Smithſon.*

the plaintiffs the next of kin were not entitled to any part of the teſtator's eſtate as undiſpoſed; but that the ſame belonged to the ſeveral legatees, and diſmiſſed the plaintiff's bill as to that claim.

From this decree the plaintiffs appealed; and upon hearing the appeal the 4th of *March* 1780, by Lord *Thurlow* C., the ſame caſes were cited as in *Digby* v. *Legard* (*a*), with the addition of that caſe. His Lordſhip declared, that ſo much of the ſhares of the ſurplus given to the ſaid *Benjamin White* and *Mary Molineux*, as aroſe from the real eſtate, was to be conſidered as real eſtate, and deſcended and belonged to the defendant, the heir at law of the teſtator; and proper directions were given for diſtinguiſhing it.

(*a*) Supr. 500.

[*Robinſon* v. *Taylor*, 6 *May* 1789, before Lord *Thurlow* C., a ſimilar caſe, where it was held to reſult for the benefit of the heir at law. J. D.]

10 June 1750. Lord Hardwicke C. Ambl. 273. S. C. and 1 Bro. C. C. 105. S. C. cited.

Ferrand v. *Prentice.*

(Reg. Lib. A. fol. 362.)

A legacy to be paid at the end of ten years. The executor to give ſecurity to pay it at the end of ten years, or to pay it into the Bank, to be placed out, and he to have the intereſt till the end of the ten years, and the plaintiff to apply for it.

THE following ſtatement is extracted from the entry.

Elizabeth Wallis, by will dated the 27th of *June*, *inter alia*, gave to the plaintiff *Hannah Maria* 200 *l.*, to be paid within ten years after her, the teſtatrix's death, and appointed the defendant executor: He proved the will; and, as alleged, promiſed to give the plaintiff ſecurity for the legacy; but, declining ſo to do, the plaintiff filed her bill, that the defendant might admit aſſets, or account for the teſtatrix's perſonal eſtate. And might give the plaintiff ſecurity

Ferrard v. Prentice.

ſecurity for the ſaid legacy, or pay it into the Bank, that it might be placed out.

The defendant, by his anſwer, admitted the will and probate, and alſo admitted aſſets. And ſaid, the reaſon why he had not given to the plaintiff ſecurity for the legacy, was, becauſe he apprehended, they had not given a ſufficient reaſon why they inſiſted on a ſecurity.

The cauſe was heard on bill, and anſwer.

See 5 Dec. 1765. Reg. lib. A. fol. 115. for another caſe and ſimilar decree.

His Lordſhip orders the defendant in a month to give a ſecurity to pay the legacy at the end of ten years from the death of the teſtatrix; and, in default, to pay the legacy into the Bank, to be placed out in Bank annuities, and the intereſt to be paid to the defendant till the end of the ten years, and then the plaintiff to apply.

Ex parte *Fenniliteau.*

17 Nov. 1781. Lord Thurlow C.

Infant mortgagee of lands in St. Chriſtophers ordered to convey, after a doubt whether the ſtatute of queen Anne extended to eſtates out of the kingdom.

THE Maſter having under a reference found an infant to be a mortgagee of lands in the Iſland of St. *Chriſtophers* in the *Weſt Indies*, within the ſtatute of the 7th of Queen *Anne*; upon the petition to confirm the report, and that the infant might convey, his Lordſhip doubted whether the act extended to lands out of the kingdom; but, upon calling for the act, and finding the words to be, "having eſtates in lands, tenements, or hereditaments, in truſt only for others, or by way of mortgage," his Lordſhip was ſatisfied, and directed the infant to convey purſuant to the act.

Worge

26 July 1780.

Worge v. *Bradley.*

Error discovered after report confirmed, ground for bill of review.

LORD Chancellor.—This cause came on for further directions after a report confirmed, the report being erroneous.

In *Gould* v. *Tancred*, 2 *Atkins*, 533, application was made to rectify error in a report after confirmation, but the petition was dismissed. Error being discovered after report confirmed, would be ground for a bill of review, if the evidence came up to it, but in this case it doth not; therefore dismiss the petition.

Trin. 1780. Lord Thurlow C. See Gibbons v. Hill, supr.

Rogers v. *Millicent.*

LEGACIES, and an annuity being likewise given out of the personal estate, and the personal estate not being sufficient, the legacies as well as the annuities were to abate in proportion; and in order to settle it, the Master to set a value on the annuities, and apportion such value.

5 July 1780.

Giles v. *Roe.*

Voluntary bounty of 60 l. by deed, and legacy of 600, by will entitled to by will; but lands covenanted to be seised in fee, not being so, administrator considered as a creditor by covenant, and satisfaction out of personal estate.

SIR *William Thomas*, by deed dated 18th *December* 1776, charged his estates therein mentioned with the payment of an annuity of 60 *l.* to the plaintiff for life, with power of entry and distress in case of non-payment, with *a covenant* that *he was seised in fee* of the premises charged with it.

By

Giles v. Rea.

By will dated the 26th *January* 1777, he confirms the deed, and gives the plaintiff a legacy of 600 *l.*

The eſtates charged with the annuity, and of which he *covenanted* to be *ſeiſed in fee*, were copyhold, and he had not ſurrendered them, ſo that the eſtates deſcended to his heir.

The bill was, for the plaintiff to be paid her legacy and to have the annuity ſecured.

Lord Chancellor.—A queſtion hath been attempted to be made, whether the plaintiff is entitled both to the annuity, and to the legacy; but there can be no doubt.

The only queſtion is under the annuity deed; the lands charged with it, and of which he covenanted to be ſeiſed in fee, and had power to diſpoſe, prove to be not ſo, except three acres of land, which are very inſufficient.

The plaintiff therefore muſt have ſatisfaction under that covenant, and will be a creditor by ſpecialty *quoad hoc*.

And the heir at law, being reſiduary legatee, and executor, and having admitted aſſets, the Lord Chancellor ordered the legacy to be paid; and a fund ſet apart out of the perſonal eſtate to anſwer the annuity.

Caſes cited: *Hill* v. *Spencer* before Lord *Camden*, in 1767, *Ambl.* 641; *Whaley* v. *Norton*, 1 *Vern* 483; *Matthew* v. *Hanbury*, 2 *Vern.* 187; Marquis *Annandale* v. *Harris*, 1 *Eq. Cas. Abr.* 31; *Prieſt* v. *Parrot*, 2 *Vez.* 160.

Brooks

7 July 1780. Lord Thurlow C.

Brooks v. *Day.*

Bill to make attorney responsible for recommending bad security.

THIS bill was to make the defendant, an attorney, anſwerable for a groſs breach of truſt (as alleged) by recommending a bad ſecurity to the plaintiff.

Caſes cited: *Arnot* v. *Biſcoe*, 1 *Veſ.* 95; and a ſimilar caſe, before Lord *Bathurſt* C.

Lord Chancellor.—If any thing is to be imputed to the defendant through negligence, he will be ſubject to damages for it at law; if through fraud, this Court is proper to relieve; but fraud doth not appear, therefore diſmiſs the bill, but without coſts.

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12 July 1780.

Stevens v. *Vaughan.*

Bill to be paid two legacies of 200 l. each: Qu. whether the laſt was in ſatisfaction of the firſt? Held not to be ſo.

JAMES Perry, by will, gives to the plaintiff a legacy of 200 *l.*, and appointed *Elizabeth Perry* executrix, who proved and poſſeſſed aſſets. She, by her will, gives the plaintiff a legacy. The bill is for an account of the perſonal eſtate of each, and to be paid.

The queſtion was, whether the legacy by Mrs. *Perry* was or was not a ſatisfaction of the legacy of 200 *l.* given by *James Perry*, to which, as executrix ſhe was liable.

Caſes cited: *Chauncey*'s caſe, 1 *P. Wms.* 409; *Mathews* v. *Mathews*, 2 *Veſ.* 237; *Lechmere* v. Lord *Carliſle*, 2 *P. Wms.* 326; *Barkham* v. *Derwine*, 2 *Eq. Ca. Abr.* 352.

The

Stevens v. *Vaughan.*

In *Pilſon* v. *Price*, 1776, the teſtator being indebted to the plaintiff in 1000 *l.*, gives him a legacy of 5000 *l.*, and directs debts and legacies to be paid. Both ordered to be paid, as in *Chancey*'s caſe, 1 *P. Wms.* 408. *Nichols* v. *Judſon*, 2 *Atk.* 300.

The Lord Chancellor declared the plaintiff entitled to both legacies, and directed the neceſſary accounts.

Roberts v. *Roberts.*

17 July 1780. Lord Thurlow C.

Admiſſion of aſſets by defendant's anſwer: he was held to it.

THIS cauſe came on upon an appeal from a decree at the Rolls, in which his Honour held the defendant executor bound by an inadvertent admiſſion of aſſets.

The queſtion was, whether the Court can relieve after a full admiſſion of aſſets?

It was argued, ſuppoſe a defendant, an executor, admits aſſets by his firſt anſwer; and upon exceptions he puts in a further anſwer, and in that corrects the firſt as to the admiſſion of aſſets, the Court will hold him to the admiſſion.

In *Morgan* v. *Gower*, 17 *March* 1776, before Lord *Bathurſt* C., ſome legacies were paid, others were not paid. It was ſaid an executor cannot make a legatee refund, though a creditor may. *Davis* v. *Davis* (*a*), and in *Burn's Eccleſiaſtical Law* (*b*); bill by an executor againſt a legatee, to refund a legacy voluntarily paid. The legatee was decreed to refund to the plaintiff the executor; for an executor paying out of his own

(*a*) 2 Eq. Ca. Abr. 554.
(*b*) 4 vol. 336, and ſupr. 32. See alſo Dagly v. Crump, 35.

Roberts v. Roberts.

own pocket, ſtands in the place of the creditor, and hath a right to call on the legatee. *Chamberlain* v. *Chamberlain*, *Ch. Ca.* 256: in this caſe a creditor made a legatee refund. *Williams* v. *Lee*, 3 *Atkins*, 223; *Brand* v. *Higbee*, in Houſe of Lords. *Hodges* v. *Waddington*, 1 *Eq. Ca. Abr.* 236; *Grove* v. *Banſon*, 1 *Ch. Ca.* 148, where legatees made a legatee refund. *Ketchmead* v. *Lincoln*.

Lord Chancellor.—The only point for conſideration is, whether his Honour was right in directing an account, the defendant having in a former anſwer admitted aſſets, and, in fact, admitted aſſets by payment; and all the other debts, and legacies being paid.

The defendant the executor afterwards ſells out of the funds at loſs. The eſtates which he at firſt admitted to be ſufficient turn out not to be ſo, and afterwards the plaintiff files his bill. It was argued, that the executor having admitted aſſets by his anſwer to a former bill, he is bound by it, and I am clear he is; beſides, having paid intereſt, it is to be conſidered as a payment, or an aſſent to the payment of the legacy.

Therefore affirm the decree; but the deposit was ordered to be paid back.

Leith

Leith v. *Pope.*

27 July 1780. Vid. 2 Bl. Rep. 1327.

Demurrer to a bill for diſcovery of aſſets to ſatisfy an execution taken out againſt defendant, after a judgment at law, over-ruled.

THE plaintiff having recovered 10,000*l.* damages at law againſt the defendant, the plaintiff filed his bill againſt the defendant for a diſcovery of aſſets, upon an idea that he had made voluntary aſſignment of his effects.

The defendant demurs to the diſcovery.

Smithier v. *Lewis*, 1 *Vern.* 398; *Angel* v. *Draper*, 1 *Vern.* 389, were cited.

Lord *Thurlow* C.—The queſtion is, whether, upon a judgment ſued out, the Court will retain a bill for diſcovery of further aſſets. There are caſes where the plaintiff, having obtained judgment at law, and taken out execution, hath a right to come here for relief: *Shirly* v. *Watts*, 3 *Atk.* 200: and in this caſe the demurrer is too large; therefore, over-rule the demurrer.

Lloyd v. *Scott.*

24 July 1780. Lord Thurlow C.

Application to quaſh writ of error in Exchequer in *qui tam* actions in King's Bench.

MOTION by Mr. *Kenyon* to quaſh a writ of error in Exchequer in *qui tam* cauſes in the King's Bench.

Stat. 27 *Eliz.* chap. 8, ſect. 2, *Sid.* 170, in debate upon the Statute of Uſury in King's Bench; *Ventris* 49, writ of error doth not lie in Exchequer Chamber in *qui tam* actions; *Aſhby* v. *White*, Lord *Raym. Rep.* 954 (*a*).

(*a*) Stated to ſhew writ of error doth not lie in Exchequer in *qui tam* actions.

Scott v. *Knapton*, *Raym.* 275; *Ryal* v. *Farrington*, *Cro. Car.* 10; *Baker* v. *Duncalfe*; *Skinner* 549; Lord *Say*

Lloyd v. *Scott.*

Say and *Seal*, *Cro. Car.* 142; 3 *Salk.* 7, the King hath no privilege in action popular (*a*).

(*a*) To ſhew ſuch writs do lie.

Lord Chancellor.—This is in the Petty Bag. By *officina brevium*, the Maſter of the Rolls takes notice of matters on the equity ſide, but on the common law ſide he hath no juriſdiction.

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2 Nov. 1780. Sir Thomas Sewel M. R.

Wood v. *Adams.*

Tenants ordered to attorn to ſequeſtrators, under a ſequeſtration for a duty.

APPLICATION that the tenants of an eſtate ſequeſtered for a duty might attorn to the ſequeſtrators.

His Honour entertained a doubt as to the propriety of the application; but after taking time to turn it in his mind, ordered the tenants to attorn.

[But *qu.* being the firſt inſtance of the kind. J. D.]

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6 Nov. 1780. Lord Thurlow C.

Fowkes v. *Chadd.*

When a bill is retained, with liberty for the plaintiff to bring an action to eſtabliſh his right, and there is a verd. & againſt him, it not being to ſatisfy the conſcience of the Court, the party muſt apply to the Court where it was tried, for a new trial.

MR. *Graham* moved for a new trial of an action of treſpaſs, which the Court, upon a motion for an injunction, directed, in order to try the right.

The Lord Chancellor ſaid, the application was improper; that it ſhould be to the Court in which the action was tried; and took this diſtinction: Where an action is to be brought, and tried, the title is a legal one, and till the plaintiff's right or title is eſtabliſhed, he hath no buſineſs here; but where an iſſue is directed, it is in order to aſcertain a fact, that the conſcience

Fowkes v. Chadd.

conſcience of the Court may be ſatisfied before it decides; which being the caſe, it is proper, if any objections are taken to the verdict, they ſhould be ſtated to the Court by which the iſſue is directed, that the Court may conſider them, and ſee whether they have ſuch weight as to make the Court diſſatisfied with the verdict. This was the Lord Chancellor's idea: but one caſe being cited, of the Earl *Pomfret* v. *Smith*, before the Lords Commiſſioners *Smith*, *Aſton*, and *Bathurſt* (*a*), (which they entered upon merely to get rid of a troubleſome man, as I heard them ſay), it ſtood over to this day, to ſee if any further inſtances were to be met with; but no other being found, the Lord Chancellor adhered to his former opinion, and would not entertain the motion.

(*a*) Supr. 437.

Mabank v. *Brooks*.

8 Nov. 1780. Lord Thurlow C.

Evidence offered to prove that a teſtator who gave a legacy to A. his executors, adminiſtrators, or aſſigns, knew A. to be dead, and meant it for his repreſentative, rejected.

Robert Maybank, in 1726 clerk to *Francis Negus* the teſtator's father, and ſo continued for many years being in great intimacy with him, in 1732 lent 845 *l.* to the ſaid *Francis*. In 1736 *Robert Maybank* died. On 8th *March* 1771 *William Negus* made a will, knowing of the death of *Robert Maybank*, and thereby ſays, "I give to *Robert Maybank*, formerly my father's clerk, 845 *l.*, his executors, adminiſtrators, or aſſigns."

In *June* 1773 the teſtator died.

The plaintiff, as repreſentative of the ſaid *Robert Maybank*, filed his bill to be paid the ſaid legacy of 845 *l.* given by the will of the ſaid teſtator, and for an account of the teſtator's eſtate.

Maybank v. *Brooks.*

One *Mott* was employed by the teſtator to make the will, and to prepare the draft.

His evidence, at the hearing, was offered to be read, to prove the teſtator intended the legacy for *Maybank*'s repreſentative, as he knew at the time of giving the inſtructions, that *Maybank* was dead.

This was objected to.

The caſes cited were, *Southwel* v. Lord *Limerick*, 2 *Eq. Ca. Ab.* 418, where a witneſs was examined *de bene eſſe*. If the plaintiff, after the defendant's anſwer, neglects to proceed ſo as to examine in chief, his evidence ſhall not be read. *Brown* v. *Selwyn*, in *Forreſter's Rep.* 240; *Ulrich* v. *Lichfield*, 2 *Atk.* 372.

Lord Chancellor.—The only article for which *Mott*'s evidence is now preſſed, is to prove that the death of *Maybank* was in the knowledge of the teſtator. Allow the objection, and diſmiſs the bill.

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20 Dec. 1780. Lord Thurlow C.

Alcock v. *Eames.*

Legacies to infants at twenty-one, if placed out in annuities, and thoſe annuities ſink in point of value; infants not bound to accept thoſe annuities in full ſatisfaction of their legacies.

IN this cauſe legacies were given to an infant at twenty-one.

Bill for an account of the perſonal eſtate, and to have the legacies placed out.

The executors admitting aſſets, the Court at length directed the legacies to be paid into the Bank, and placed out in annuities, which was done.

By the fall of the funds, at the time the infants came of age, the annuities fell far ſhort, in point of value, of the legacies.

The

The Lord Chancellor thought they were not bound to accept the annuities in ſatisfaction of the legacies; but that they were to take the value in part, and the deficiency was to be made good out of the general perſonal eſtate. *Alcock* v. *Eames.*

Wellins v. *Lomans.*

23 Jan. 1781. Lord Thurlow C.

A DEFENDANT, a mortgagor, living or being about to go abroad, by an indorſement on the mortgage deed (as it was alleged), agreed, in caſe he ſhould not redeem by a limited time therein mentioned, that two perſons therein named for the purpoſe, ſhould accept a ſubpœna for him to appear, and anſwer any bill that ſhould be filed againſt him, touching the mortgage; the plaintiff having filed his bill to foreclose, applied this day, by his Counſel Mr. *Ambler*, to ſerve the perſons named in the ſaid indorſement with a ſubpœna to appear, and that ſuch ſervice might be deemed good on the defendant. After ſtanding over for conſideration, his Lordſhip denied the motion.

Application to ſerve two perſons named by a mortgagor for that purpoſe in an indorſement on the mortgage, with a ſubpœna to appear to a bill filed by the mortgagee againſt the mortgagor to foreclose, the mortgagor having been out of the kingdom ſo long as not to come within the act of 5 Geo. 2. to render proceſs effectual againſt perſons who abſcond: the motion denied.

(*a*) Supr. 102.

(*b*) Supr. 39.

There were two caſes mentioned, *Hyde* v. *Foſter* (*a*), before Lord *Hardwicke*, the 5th of *Auguſt* 1745, and *Carter* v. *De Brune* (*b*), the 12th of *July* 1722; but in thoſe caſes it was admitted, or proved, that the perſons ſerved acted as attornies or agents for the defendants, and the commiſſion ordered, which is, of courſe, to ſerve an attorney at law, is merely to obtain an injunction; and there is no inſtance where the Court went farther, in caſe the bill prayed other relief than an injunction. Beſides, in this caſe it doth not appear that it was with the privity of the perſons named in the indorſement that their names were uſed; neither doth it appear they would accept a ſubpœna to appear for the defendant; for who would indemnify them? And ſhould they appear without authority, they would be anſwerable; and unleſs they did appear, the bill would not be taken

Wellins v. *Loman*, *pro confeſſo*, the defendant not coming within the act of the 5th of *Geo.* 2. to render proceſs effectual againſt perſons who abſcond to avoid being ſerved, or being ſerved, refuſed to appear, the defendant having been out of the kingdom above two years before the bill was filed.

The motion was, on a future day, renewed before Lord Kenyon, ſitting for the Chancellor, in another ſhape, and again denied. J. D.

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23 March 1781. Lord Thurlow C.

Pitcher v. *Helliar*.

A receiver of an infant's eſtate ordered upon filing the bill, and before a ſubpœna to appear had been ſerved.

THE plaintiff is tenant in tail of the real eſtate, and of the money to be raiſed by the ſale of other eſtates (which had been ſold), and of which the plaintiff's father was tenant for life.

The father filed his bill againſt the defendant *Helliar*, the acting executor, (the other executors having declined to prove), who had poſſeſſed, for an account, and to have the property ſecured.

The defendant *Helliar* abſconded, and was in contempt to a commiſſion of rebellion, for want of his anſwer.

The plaintiff's father died, and the plaintiff's right, as tenant in tail, taking place, the plaintiff filed his bill againſt the defendant *Helliar*, for an account, and for a receiver.

Before a ſubpœna had been ſerved, and indeed it could not, the defendant *Helliar* not being within the kingdom within two years preceding the bill, the plaintiff applied this day for a receiver; and upon an affidavit ſtating all the circumſtances, and the danger the property was in of being loſt for want of being got in:

His

His Lordſhip ordered a receiver; and ſaid he would have ordered one, even if there had been no bill. *Pitcher* v. *Helliar*

The Maſter of the Rolls had refuſed a like motion.

Harrington v. *Chaſtel.*

15 Nov. 1781. 1 Bro. C. C. 124. S. C.

THE plaintiff having obtained an injunction, this day ſhewed cauſe for continuing it. The caſe was this: Earl *Rochford*, being Groom of the Stole, procured the plaintiff to be appointed a page of the bed-chamber, upon condition he entered into bonds to pay annuities to certain perſons during his life.

Injunction to ſtay proceedings at law on bonds, the conſideration being a place procured about the perſon of the king.

It was inſiſted, that ſhould this not be a ſale of an office within the ſtatute of the 5th and 6th of *Edw.* 6. this Court will ſet aſide the bonds for fraud and impoſition.

Caſes cited: *Law* v. *Law*, *Forr. Rep.* 140; *Debenham* v. *Ox*, 1 *Vez.* 276; *Godolphin* v. *Tudor*, 2 *Salk.* 468; *King* v. *Vaughan*, in King's Bench, *Hawkins's Pleas of the Crown*, fol. 168; *Hall* v. *Potter*, *Shower's P. C.* 76.

Lord Chancellor.—Allow the cauſe.

This cauſe was heard by Lord *Thurlow* on the 5th of *February* 1783, and the injunction made perpetual.

17 May 1771. Lord Bathurst C.

Dickenſon v. *Mavie.*

500 l. to be paid to the wife to proſecute a ſuit in jactitation of marriage, although no agreement before marriage.

THE defendant, the wife of the plaintiff, was ſeiſed of lands. She married the plaintiff in *France.* She was ordered to be paid 500 *l.* to proſecute a ſuit in the Spiritual Court, for jactitation of marriage, although there was no agreement before marriage.

See *Periſhall* v. *Squire*, *ſupr.* 31.

29 June 1781. Lord Thurlow C.

Taylor v. *Rhiddee* and *Aſtle.*

Motion to refer it to Maſter to ſee whether the anſwers put in to three former amended bills were not ſufficient anſwers to a fourth amended bill, refuſed.

ON the 1ſt of *June* 1781, Mr. *Mitford* moved, as of courſe, for the defendant *Aſtle*, "that it might be referred to a Maſter to examine, and certify whether the anſwers put in to the plaintiffs, three former amended bills were not ſufficient anſwers to the fourth amended bill, on the following detail of facts:

15th *April* 1777, the original bill againſt *Rhiddee.*

21 *May* 1778, order to amend by adding parties.

The defendant *Aſtle* made a party defendant.

5th *November* 1778, *Aſtle* anſwered.

Hilary 1779, the bill again amended.

29th *October* 1779, *Aſtle* anſwered the amendments.

Hilary 1780, exceptions taken to the anſwer.

27th *March* 1780, the anſwer reported ſufficient.

Eaſter 1780, the bill again amended.

27th *November* 1780, *Aſtle* anſwered the amended bill.

7th *March* 1781, order to amend the bill again, and the bill amended.

It

Taylor v *Rhiddle* et al.

It was ſaid there was a precedent in ſupport of the motion; it however ſtruck his Lordſhip as novel, and therefore he ordered me to look into it.

The name of the caſe alluded to was, *Johnſon* v. *Rogers*, 17th *January* 1769, but it was not in point; beſides, that was moved ſpecially on notice.

On this day it was again mentioned, when his Lordſhip ſaid, it certainly was not a matter of courſe; that it muſt be upon very particular circumſtances, ſuch as frivolous, and repeated amendments, evidently for delay, on which he would grant the motion, and then it muſt be upon notice.

That the plaintiff having ſerved a ſubpœna on the defendant to anſwer the amendments, the defendant was bound to anſwer them, but that he might ſay he could not give any other anſwer to them than what he had ſaid in his former anſwers: And therefore his Lordſhip directed the order not to be drawn up.

Haſſel v. *Simpſon*.

21 June 1781. Lord Thurlow C.

A new trial granted, of an iſſue to try whether a bankrupt had committed an act of bankruptcy, at a given time, founded on a general aſſignment of his effects, when not indebted, and in full credit.

UPON the hearing of the cauſe, an iſſue was directed to try, whether *Jackſon* the bankrupt had, on or before a given day, committed an act of bankruptcy.

On trial of the iſſue, the jury found that by the general aſſignment of his effects he had committed an act of bankruptcy.

The caſe was this:

At the time of the tranſaction in 1773, the bankrupt was poſſeſſed of property to the value of 1200 *l.* or 1300 *l.*:

Haſſel v. *Simpſon.*

A houſe - - -	400
Furniture - - -	200
Stock - - -	700
	£1300

and in *full* credit:

And no evidence that he was at that time indebted.

He had borrowed 200 *l.* of one *Ellen Barber*: the ſecurity propoſed was the bankrupt's bond, and the defendant *Simpſon* to join with him in it.

Before the execution of the bond, he agreed to indemnify *Simpſon*.

Child, an attorney, was agreed upon to prepare the indemnity.

The inſtructions were *given by Jackſon*, the defendant *Simpſon not being preſent, nor having ſeen Child* previouſly to the giving of the inſtructions.

The ſecurity propoſed by *Jackſon* the bankrupt was a mortgage of the houſe; and he ſaid, at the ſame time, he had furniture and ſtock; and left it to *Child* to prepare the ſecurity at his own diſcretion.

Child, without any participation with the defendant *Simpſon*, prepared a general aſſignment of the bankrupt's eſtate and effects defeazible. And *Simpſon* permitted *Jackſon* to continue in poſſeſſion.

By Statute of 1ſt of *James* 1, chap. 15. a bankrupt remaining in poſſeſſion of goods aſſigned, they ſhall belong to the creditors.

Ryall

Ryall v. *Rolle*, 1 *Atk.* 165; *Worſley* v. *De Mattos*, 1 *Burrows*, 467; *Twyne*'s caſe, 3 *Co.* 80. *Haſſel* v. *Simpſon.*

But there is a diſtinction where goods are aſſigned as a ſecurity, and when on an abſolute aſſignment, and the bankrupt continues in poſſeſſion.

And there is likewiſe a diſtinction where an aſſignment is made on the *eve* of a *bankruptcy*, and a *bankruptcy in contemplation*, and where made in time of full credit.

Wilſon v. *Day*, 2 *Burrows*, 827; *Alderſon* v. *Temple*, 4 *Burrows*, 2235; *Linton* v. *Bartlet*, 3 *Wilſon*, 47: in this caſe, the bankrupt, the very evening before he abſconded, aſſigned to his brother, to give *preference* to the other creditors.

Law v. *Skinner*, *Blackſtone's Rep.* vol. 3, fol. 936; *Jacob* v. *Sheppard*, cited in *Cock* v. *Goodfellow*, 2 *P. Wms.* 430.

In *March* 1783, the Lord Chancellor, upon theſe caſes, granted a new trial.

Green v. *Pigot.*

23 June 1781.
1 Bro. C. C. 103.
S. C. Vid. alſo
2 Bro. C. C. 58.

THE plaintiff at twenty-one entitled to a legacy, with intereſt in the mean time, brings his bill againſt the executor and reſiduary legatee to have the legacy raiſed, and paid into the Bank, and laid out: And it was ſo decreed by the Maſter of the Rolls.

This cauſe was heard upon an appeal to the Lord Chancellor of the defendant, as to ſo much of the order on hearing as directs the legacies to be raiſed and ſecured,

For

Green v. *Piget.*

For the appellant.—The legacy is given *to the plaintiff at twenty-one:* if he die before, the legacy drops. There is not the leaſt ſurmiſe that there is any danger of loſing it from the circumſtances of the defendant: beſides, as the real eſtate is charged by the will, the eſtate cannot be parted with, but muſt remain ſubject to the legacy, be it in whoſe hands it may, when the legacy becomes payable.

The caſes cited upon this head were, *Walker* v. *Cook*, *February* 1781 (*a*); *Johnſon* v. *De la Crueze* (*b*), 17th *July* 1749; *Pearce* v. *Taylor*, 7th *May* 1778.

(*a*) 1 Bro. C. C. 105.
(*b*) 1 Bro. C. C. 105.

If a legacy be given to an infant to be paid at twenty-one, and the infant die before he attains that age, his executor or adminiſtrator cannot demand it until the time arrives, at which, had the defendant lived, it would have been paid.

Lord Chancellor.—I do not incline to vary the decree, and without going into the caſes, let the decree be affirmed.

Trin. Term 1781.
Lord Thurlow C.
1 Bro. C. C. 99.
S. C.

Caſſon v. *Dade.*

THE teſtatrix ſat in her coach, and executed her will at the door of her attorney's houſe. The witneſſes atteſted it in the office of the attorney, through the window of which, it appeared by the evidence of a perſon in the carriage, the teſtatrix might ſee what paſſed. The witneſſes, as ſoon as they had ſubſcribed the will, took it to her, when ſhe folded it up, and put it into her pocket. The Lord Chancellor held this to be a good execution of the will.

Bourke

Bourke v. Lord *Macdonald.*

Trin. 1781. Lord Thurlow C.

Service of a ſubpœna to appear on the defendant in Scotland, being out of the juriſdiction of the Court, the propriety of iſſuing an attachment under doubted, though thought by the Maſter of the Rolls, and moſt of the practitioners, to be regular.

THE defendant was ſerved in *Scotland* with a ſubpœna to appear. On his coming into *England* ſome time afterwards, the plaintiff ſued out an attachment againſt him for not appearing, and he was taken under it.

The defendant applied to diſcharge the attachment for irregularity. A doubt aroſe with the Lord Chancellor whether the attachment iſſued regularly, the defendant being ſerved with the ſubpœna out of the juriſdiction of the Court. It ſtood over ſeveral times for conſideration, his Lordſhip not being ſatisfied, although Sir *Thomas Sewel* M. R., and moſt of the practitioners were clear as to the regularity. It afterwards dropped.

Macnamara v. *Jones.*

19 May 1784. Lord Thurlow C.

If an executor employs a ſolicitor to do buſineſs for him in the management of his teſtator's affairs, he ſhall be allowed what he pays the ſolicitor for ſuch buſineſs.

THE defendant *Barber*, who had formerly acted as, and was a ſolicitor of the Court of Chancery, was the acting executor of the will of *Arthur Jones* Eſquire, the teſtator in the pleadings named. The defendant *Barber* employed a Mr. *Davies*, who had been his clerk, to do buſineſs for him in the management of the teſtator's affairs. In taking the account under the decree, the Maſter refuſed to allow him ſums paid to the ſaid *Davies*, ſaying it was the executor's buſineſs, and he ought not to be allowed it. Upon arguing exceptions taken by the defendant *Barber* to the report:

The

Macnamara v. *Jones.*

The Lord Chancellor ſaid, he was clear, that if an executor pays an attorney for his trouble and attendance in the tranſacting and conduct of the teſtator's affairs, he ought to be allowed, and repaid what he ſo pays: and referred it to the Maſter to tax *Davies*'s bill.

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18 Aug. 1781. Lord Chancellor.

Grierſon v. *Grierſon.*

Marriage in Scotland: validity doubted.

COMPLAINT againſt a perſon for marrying a ward of the Court in *Scotland.*

The Lord Chancellor doubted the validity of the marriage; therefore referred it to the Maſter to ſee if *any marriage* had been *rightly* celebrated, and to ſtate the circumſtances.

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1 Aug. 1781. Lord Thurlow C.

Dominicetti v. *Latti.*

Though a plaintiff by his bill ſtates an account by which a balance appears to be due to him, and the bill is decreed to be taken *pro confeſſo*, and an account directed, and the charge is what is ſtated by the bill, he muſt prove it.

BILL for an account of dealings and tranſactions, and for a diſcovery. It ſtated dealings and tranſactions between the plaintiff and defendant, and that the plaintiff had paid to, and received ſums of money from the defendant, and the plaintiff annexed a ſchedule to the bill. The defendant having abſconded, the bill was decreed to be taken *pro confeſſo* againſt him; and the Maſter was directed to take an account of all dealings and tranſactions between the plaintiff, and the defendant, and the parties were to be examined upon interrogatories, and produce books, &c. as the Maſter ſhould direct. The plaintiff carried in his charge of what he ſtated by the ſchedule to the bill to be due to him. The Maſter required

required the plaintiff to prove his charge; which the plaintiff not doing, the Maſter made his report that nothing was due. The plaintiff took exceptions; the exceptions were argued in *Trinity* Vacation 1781, and ſtood over for the purpoſe of enquiring into the practice. They came on again this day, when the Lord Chancellor over-ruled the exceptions, and put this caſe: Suppoſe the defendant had anſwered, and the plaintiff had not replied to the anſwer, muſt not the plaintiff have proved his charge?

Dominicetti v. *Latti.*

Stedmore v. *Padmore.*

31 Nov. 1781. Lord Chancellor.

BILL to eſtabliſh a will.

One of the witneſſes was not examined; but it being proved he had been gone abroad five years, and could not be found, nor any intelligence had of him.

The Court, notwithſtanding, declared the will well proved, &c.

If witneſs to a will is not to be found, no impediment to eſtabliſhing the will.

Bennet v. *Hammond.*

6 Dec. 1781.

BILL to be let into poſſeſſion of one moiety of the eſtates in queſtion, and for an account of rents, and profits.

Queſtion upon ſpoliation.

The caſe was this: *Peter Bennet*, the grandfather of the plaintiff, had two ſons, *William* and *Barnaby*, and ſeveral daughters, and was poſſeſſed of a real eſtate of about 120 *l.* a-year.

He

Bennet v. *Hammond.*

He deviſed his eſtate at *Shafteſbury* to his two ſons and their heirs, in joint tenancy, ſubject to charges thereon.

Upon the death of the teſtator, *William* the heir took poſſeſſion of all his father's eſtate.

William was prudent: *Barnaby* was a ſpendthrift.

In 1755 the two brothers entered into an agreement, ſtating that all accounts between them were ſettled, and all *William*'s demands on *Barnaby* were diſcharged. And *William* agreed to diſcharge all demands on the eſtate, and to pay *Barnaby* 10 *s.* 6 *d.* a-week, and *Barnaby* to make over all his intereſt in the eſtate to his brother *William*.

An agreement was accordingly drawn up and ſigned by them, that *Barnaby* ſhould convey.

This was in *July*. Soon after *Barnaby* fell into a bad ſtate of health, therefore *William* did not preſs *Barnaby* to convey; as in caſe he, *William*, ſurvived, he would take as heir at law to *Barnaby*.

William was taken ill, and made a will before the agreement was carried into execution; and thereby diſpoſed of his eſtate as if he and his brother *Barnaby* had been tenants in common, to his ſon by his firſt wife, if he attained twenty-one, if not, he gave it over to his ſon *William*, by his ſecond wife; and gave the reſidue of his eſtate to his ſon *William* by his ſecond wife, and appointed his wife executrix.

William the brother died. After his death, Mr. *Kay*, the attorney who prepared the agreement, delivered in a bill of his fees and diſburſements, in which was contained a charge for attending the execution of the agreement.

After

Bennet v. *Hammond.*

After the death of *William*, *Barnaby* his brother contrived to get the agreement in his cuſtody, and burnt it; and then got into poſſeſſion of the eſtate, and enjoyed it till his death; and by will deviſed it to the child of his niece *Frances Durnford.*

The deed not exiſting, the firſt queſtion was, what would be the reſult in point of law? The plaintiff inſiſted that *Barnaby*, from the time of the execution of the agreement, was to be conſidered as a truſtee of the eſtate for *William:* that there was no room for enquiry into the conſideration of the deed: that the deſtruction of the deed by *Barnaby* eſtabliſhed it: that it was unneceſſary to ſtate how far Courts have gone in *odium ſpoliatoris.*

Caſes cited: *Teuriſa* v. *Delany*, appeal from *Ireland*, the firſt caſe of ſpoliation; Attorney General and Lord *Hunſdon* v. Counteſs of *Arundel*, in *Hobart's Rep.* 109; *Hampden* v. *Hampden*, in 1708, 1 *P. Wms.* 733, 1 *Brp. P. C.* 250; *Dawſon* v. *Coteſworth*, in 1721.

The Maſter of the Rolls.—When a perſon comes into this Court for equity, he muſt come with clean hands. The tranſaction, with reſpect to the agreement, by the plaintiff's own ſtatement, is ſuſpicious. No conſideration is pretended, except 10*s.* 6*d.* a-week, 27 *l.* 10*s.* a-year, for the fee of his moiety of an eſtate of 120*l.* a-year: The very tranſaction ſpeaks an impoſition. And if there had been ſpoliation, it is a little extraordinary that it ſhould be ſuffered to paſs in ſilence during the life of *Barnaby*, and fifteen years after the fact, if ſuch were the fact, to take it up. But the ſpoliation is not clear; and I will not ſtrain a point to ſuppoſe a ſpoliation of what might never exiſt; and therefore diſmiſs the bill.

Schrieber

18 Dec. 1781. Lord Chancellor.

Schreiber v. *Lateward.*

Contempt on marrying a ward by commitment not ſufficient, held to be a conſpiracy, and an information recommended.

THE matter before the Court aroſe on the marrying of a ward of the Court, in which there was a combination. The Lord Chancellor called it a conſpiracy. A commitment his Lordſhip thought not a ſufficient puniſhment: and recommended an information in the Court of King's Bench.

Caſes cited: The King v. *Molloy*, *Trinity*, 14 and 15 *Geo.* 1; the King v. *Comforth*, *Hilary*, 15 *Geo.* 2; the King v. *Atkins*: the King v. *Sweet*, *Hilary*, 1767; the King v. Lord *Oſſulſton*, 10 *December* 1747, 2 *Strange*, 1107, 3 *Keble*, 101; the King v. *Hervey*, 13 and 14 *Geo.* 2; the King v. *Storey*; and the King v. *Turſlet.*

7 Feb. 1782. Lord Thurlow C.

Johnſon v. *Smith.*

Affidavit ſworn in Ireland before a Maſter, to ground a writ of *ne exeat regno* admitted, after doubt and conference with the Judges.

(*a*) Supr. 90.

(*b*) Supr. 150.

AFFIDAVIT of the plaintiff ſworn in *Ireland*, before a Maſter, to ground a writ of *ne exeat regno*, offered to be read. His Lordſhip, notwithſtanding the orders in the caſes of *Anneſly* v. Earl of *Angleſey* (*a*), 13th *February* 1743, and *Alcock* v. *Carter*, 1 *Strange*, 545, and *Chicot* v. *Le Queſne*, 4th *June* 1751 (*b*), which were produced to his Lordſhip, doubted the admiſſibility of it. But having afterwards, as he ſaid, conferred with the Judges, he admitted the affidavit to be read, but denied the motion.

Wilſon

Wilſon v. *Foreman.*

11 April 1782.
Lord Thurlow C.

Truſtees in the plaintiff's marriage ſettlement, lent part of the truſt monies in their hands to the huſband, when in full trade and in credit, upon his bond. He purchaſed an eſtate, and took the conveyance to himſelf in fee ſimple. He afterwards became bankrupt, and the eſtate ſo purchaſed, with other eſtates and effects, were conveyed and aſſigned to his aſſignees. The eſtate ſo purchaſed was held to be purchaſed with the truſt money, and ordered to be conveyed to new truſtees upon the truſts in the ſettlement, in part of the bond debt, and the truſtees to prove the remainder of the debt under the commiſſion.

THE plaintiff Mrs. *Wilſon*, before her marriage with the defendant *Wilſon* the bankrupt, was ſeiſed and poſſeſſed of real and perſonal property. Part of it was, on her marriage, conveyed and aſſigned to truſtees named in her ſettlement, upon the truſts in the ſettlement. The huſband carrying on the trade of a brewer, and in high credit, the truſtees lent him part of his wife's fortune upon his bond. He purchaſed, amongſt other eſtates, an eſtate called *Falling Foſs*, and took the conveyance of it to himſelf and his heirs. He afterwards was found and declared a bankrupt, and his eſtate and effects, and, *inter alia*, *Falling Foſs*, were aſſigned and conveyed to the defendants his aſſignees. The queſtion in the cauſe was, whether the eſtate the bankrupt ſo purchaſed in his name, was to be conſidered as part of the truſt money, the money being lent to the bankrupt upon his bond, without any ſtipulation or reſervation; or whether the truſtees were to be conſidered as creditors of the bankrupt for the money lent, and merely to receive a dividend for it with the other creditors. On the part of the aſſignees it was contended, that the plaintiff and her truſtees ought not, neither could they be conſidered in any other light than as creditors for the money ſo lent, any more than if it had been lent to a ſtranger, and they had taken his bond: that money had no ear-mark: that if the truſtees had acted wrong in lending the money, they were to blame, and ſhould make it good, and not throw the loſs upon the creditors. The Lord Chancellor was of opinion, the

Wilson v. *Foreman.*

money on the bankrupt's bond, and laid out, was to be considered as part of the trust money, and directed new trustees to be appointed, and *Falling Fos* estate to be conveyed to such newtrustees upon the trusts in the settlement, and the trustees to go in under the commission of bankrupt, to prove as a debt the remainder of the money lent, beyond what he paid for the estate.

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1 Aug. 1775. 1 Bro. C.C. 134, S. C.

Lucas v. *Calcraft.*

As in commission and partition, so in dower, each party bears his own costs.

COMMISSION decreed to set out dower. On hearing the cause for further directions, it stood over to consider whether the Court ever gave costs; and on 20th *April* 1782, Lord *Thurlow* C. was decidedly of opinion, that as in partition, so in dower, each party bears his own costs.

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20 April 1782, Lord Thurlow C. 1 Bro. C.C. 140. S. C.

Wirdman v. *Kent.*

(Reg. Lib. fol. 295.)

An appeal will not lie for costs only.

THIS cause came before the Court on an appeal, evidently to be relieved merely against costs, though other matters were introduced into the petition to give colour to it. It was admitted by the Bar, a party could not re-hear for costs only, but it was questioned whether a party could not appeal for costs only: but the Lord Chancellor said, he had ever understood a party could not appeal for costs only, and for the general reasons laid down in *Owen* v. *Griffith*,

v. *Griffith*, before Lord *Hardwicke* C., 2 *Vezey*, 250. The other grievances complained of were diſregarded as frivolous. *Wirdman* v. *Kent*.

The above caſe being laid before the Barons of the Exchequer upon a like doubt, the Court determined in the ſame manner, in *Williams* v. *Begnon*, 27th *January* 1792.

Winter v. *Kent*.

17 July 1782. The fourth Seal. Lord Thurlow C.

(Mr. *Wright*'s Minute Book.)

After having replied to a defendant's anſwer he is not to be examined, for it cannot be ſaid he is not intereſted.

THE defendant *Kent* was the executor of the teſtator, for an account of whoſe affets and other matters the bill was brought. The teſtator had purchaſed a real eſtate in the name of others, of which the ſaid defendant was the only evidence. The defendant having anſwered, the plaintiff replied. It being neceſſary to prove the fact of the eſtate's being purchaſed for the teſtator, though taken in the name of others, it was moved the third Seal as of courſe, and granted, for leave to examine the ſaid defendant, upon the common ſuggeſtion that he was not intereſted, without withdrawing the replication.

Mr. *Lloyd*, on the above 17th of *July* 1782, mentioned it again, and ſtated the facts, and circumſtances ſpecially, when it was granted. Being appriſed of the motion and order by Mr. *Wright*, I took the liberty of ſubmitting to his Lordſhip, that the motion was irregular. It could not be ſaid the defendant was not intereſted, for that, by replying to his anſwer, it was evident the plaintiff thought him inte-

Winter v. *Kent.*

reſted: that if the plaintiff was at liberty to examine the ſaid defendant generally, and the order was not reſtrictive, the plaintiff might examine to falſify his anſwer, as the replication was general, not ſpecial; and that, having examined a defendant, the plaintiff could not pray a decree againſt him. His Lordſhip ſaid, the reaſons were very ſtrong, and directed the order not to be delivered.

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30 April 1782. Lord Thurlow C.

Lander v. *Whitmore.*

Delivering the body of a ſubpœna to the defendant's wife, at his dwelling-houſe, which ſhe threw down, and the ſolicitor afterwards thruſt under the door, held to be good ſervice of a ſubpœna to ſhew cauſe againſt a decree.

THE defendant not appearing at the hearing, although duly ſerved with a ſubpœna for the purpoſe, a decree was pronounced againſt him which was to be binding, unleſs he being ſerved with a ſubpœna to ſhew cauſe againſt the ſame, ſhould ſhew cauſe to the contrary. The body of a ſubpœna was delivered to the defendant's wife at his dwelling-houſe, which ſhe threw down, and the plaintiff's ſolicitor thruſt under the door. The Counſel for the plaintiff, on applying to make the decree abſolute, made a doubt whether ſerving the ſubpœna in that manner was good ſervice. It ſtood over for two days; but upon referring to *Tothil*, and the *Practical Regiſter*, and mentioning to his Lordſhip *Kinſey* v. *Kinſey*, before Lord *Hardwicke*, in which caſe the plaintiff's ſolicitor gave the body of a ſubpœna to the maid-ſervant of the defendant, at the dwelling-houſe, as ſhe was ſweeping the paſſage, and which ſhe ſwept into the ſtreet; and a caſe in *Cary's Rep.* fol. 54; *Barlow* v. *Barker*, *Cary*, 76, 18th and 19th *Eliz.*,

Eliz., in which caſe an attachment iſſued againſt a defendant, whoſe wife had been ſerved with a ſubpœna for him to appear; his Lordſhip allowed the ſervice to be good.

Lander v. *Whitmore.*

Samwell v. *Wake.*

1 May, 1782. Lord ThurlowC. 1 Bro. C.C. 144. S. C.

SIR *Thomas Samwell* by will, dated the 1ſt of *November* 1778, willed as follows:—'I direct that all 'and ſingular the debts which I ſhall owe at the time 'of my death, and the ſeveral legacies hereafter given 'or bequeathed, be fully paid and ſatisfied; and for 'that purpoſe, I hereby charge and ſubject all and 'every my manors, &c. and real eſtates in the county 'of *Northampton*, with the payment of all my 'debts and legacies accordingly; and the better to 'diſcharge and ſatisfy the ſame, I will and ordain, that Sir *William Wake*, and *John Peach Hungerford*, ſhall with all convenient ſpeed by ſale or 'mortgage of the premiſes, or a competent part there 'of, *and by receipt* of the rents and profits of the premiſes, levy and raiſe ſufficient for that purpoſe; and 'when and as ſoon as they ſhall have ſuch ſums as 'aforeſaid, do and ſhall forthwith pay and apply the 'ſame in payment of my debts and legacies; and for 'the better and more effectual performing my will, I 'do expreſsly give and grant to the ſaid Sir *William* 'Wake, and *John Peach Hungerford* (whom he appointed 'executors of his will), full authority to receive the 'rents, and to ſell and convey ſo much and ſuch part 'of the premiſes, as ſhall be ſufficient for the purpoſes 'aforeſaid; and ſubject to, and charged, and charge-

Perſonal aſſets are the primary fund, to pay debts, and if not exempted by expreſs words, or ſtriking circumſtances will remain liable.

Samwell v. Wake.

'able with the payment of my debts and legacies, I 'give and deviſe the ſaid manors and eſtates, to *Tho-* 'mas Samwell (the plaintiff in this cauſe) for life, with 'remainder over in ſtrict ſettlement, firſt, to Sir *Wen-* 'man Samwell, &c. And gave and bequeathed to the 'plaintiff, all his perſonal eſtate.'

The plaintiff brought his bill to eſtabliſh the will, and to have the perſonal eſtate paid to him, exempt from debts and legacies; and the queſtion on the will was, whether the plaintiff took the teſtator's perſonal eſtate, exempt from his debts and legacies? It was urged, that the teſtator certainly meant a benefit to the plaintiff; but that if the perſonal eſtate was to be applied in payment of the debts and legacies, as the plaintiff was a mere tenant for life of the deviſed eſtates; and by the will, the *rents and profits* of thoſe eſtates were charged, and made chargeable, with the debts and legacies, it might happen, that the plaintiff might receive little, if any benefit by the will.

The following caſes were cited, *Halliday* v. *Boxman*; *Rinbleton* v. *Cook*, 1775; *Adams* v. *Meyrick*, 1 *Eq. Ca. Abr.* 271; *Wainwright* v. *Bendlows*, 1 *Eq. Abr.* 271.

Lord Chancellor.—A man's perſonal eſtate is the primary fund for payment of his debts, and if not exempted by expreſs words, or ſtriking circumſtances, will remain liable: In the will before me, there are no ſuch words; and from the language of the will, as to his real eſtate, it is evident to me, he meant to ſubject, and charge it only in aid of his perſonal eſtate.

And therefore his Lordſhip after eſtabliſhing the will, declared the perſonal eſtate was not exempted from the payment of the teſtator's debts and legacies; and directed accounts of them, and of the perſonal eſtate, and the application of it.

Baniſter v. *Way.*

6 Feb. 1782. Lord Thurlow C.

BILL by creditors, to have the truſts of a will executed, and the eſtates thereby deviſed for payment of debts, ſold; the heir at law in this caſe could not be found. Lord *Thurlow* C. having declared the will well proved, it having been proved *per teſtes*, I took the liberty of mentioning to him in his room, the next day, the preceding caſes of *French* v. *Baron*, and *Cator* v. *Butler*; his Lordſhip ſaid, he did not ſee the impropriety of it; for directing the deviſed eſtate to be ſold, was in effect eſtabliſhing the will, and executing the truſts; and the heir at law, when he ſhould appear, muſt get rid of it as he could.

In this cauſe the heir at law could not be found, but the will having been proved *per teſtes*; the Court upon conſideration declared it well proved.

Field v. *Jackſon.*

15 May. 1782. Lord Chancellor.

MOTION for an injunction to ſtay making a cut through grounds, in the nature of waſte, on notice: by the defendant it was inſiſted, that the plaintiff had not ſhewn his right.

Injunction for waſte denied, becauſe plaintiff's right doubtful.

A caſe was cited by Mr. *Cox*, in *Eaſter* Term, 1744, where a motion, on affidavit of certificate for an injunction was denied, becauſe the plaintiff did not ſhew *his right*. *Note.* That is always expected; many have been ſince refuſed for the like reaſon. *Fanſhaw* v. *Rotheram*, 25 *March* 1748.

Lord Chancellor.—The power the Court exerciſes to grant injunctions is great, and therefore it is cautious how it exerciſes ſo large a power; and I will follow

Field v. *Jackſon.*

my predeceſſors: I will not ſay this Court will not grant an injunction upon particular circumſtances, but I am far from thinking, that when a right is doubtful, the Court will grant an injunction.

This caſe ariſes upon the conſtruction of an act of parliament, which is doubtful, whether the defendants have a right to make a cut or not; yet as it is not clear, the defendants have not exerciſed the power given by the act, I will not interfere. Therefore take nothing by the motion.

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9 July 1782. Lord Thurlow C. 1 Bro. C.C. 166. S. C.

Chamberlain v. *Dummer.*

THE defendant had power by her huſband's will, to cut down timber for her own uſe, without any reſtriction at ſeaſonable times; ſhe having cut down trees planted in avenues, &c. on the 28th of *March* 1782, *Reg. Lib. A. fol.* 410, Sir *Thomas Sewel* granted an order for an injunction to ſtay waſte generally; the defendant having anſwered, applied to diſcharge the order; it came on ſeveral times, and ſtood over for judgment.

The following caſes were cited, *Packington* v. *Packington*, ſupr. 3 *Auguſt* 1745; *Obrien* v. *Obrien* (*a*), 20 *May* 1751, *Lib. B.* 264; Lord *Caſtlemain* v. Lord *Craven* (*b*), 7 *Dec.* 1773; and *Aſhton* v. *Aſhton* (*c*), by Lord *Hardwicke.*

(*a*) 1 Bro. C. C. 167.
(*b*) 2 Eq. Abr. 758.
(*c*) 1 Eq. Ca. Abr. 41.

On the 19th *July*, upon it's being ſpoken to again, his Lordſhip made an order for an injunction, to ſtay cutting down trees, planted, or growing for ornament, &c. ſhelter, &c.; and the injunction was alſo to extend to prevent the cutting down any timber, or other tree,

except at ſeaſonable times and in an huſbandlike manner; and likewiſe from cutting down ſaplings, and young trees, not fit to be cut for the purpoſes of timber.

Chamberlain v. *Dummer.*

Wilkinſon v. *Lovell.*

23 July 1783. Lord ThurlowC.

IN 1749, a bill was filed againſt the managers of the *Royal Family* privateers, for an account of the prizes, &c. and for the plaintiffs to be paid their ſhares of the prize money.

In 1752, the cauſe was heard, and the account was ordered; and payment of what the ſhares amounted to, was directed.

The cauſe ſlept till 1781, when the plaintiff filed his bill, to carry on, and proſecute the ſaid decree.

The following caſes were cited: *Hollingſhead*'s caſe, 1 *P. Wms.* 742; *Comber*'s caſe. 1 *P. Wms.* 766.

Lord Chancellor. — The queſtion is, whether length of time is a bar? That will depend upon circumſtances, which the Court will expect to be amply proved: That cannot be done by a plea, and therefore this is not a proper caſe for a plea; but this is ſuch a caſe, as the Court would not, on hearing the cauſe, order the decree to be carried on. His Lordſhip cited, *Cooper* v. *Crowele*, 25th *July* 1773, in which twenty-ſeven years had elapſed after a decree; *Burgeſs* v. *Mitchell*, in *Gilbert's Reports.*

Plea to a bill of revivor, filed in 1781, to proſecute a decree in 1752, and which had ſlept from that time, overruled, as not being proper, but ſaid by Lord Chancellor, to be ſuch a caſe as the Court would not on hearing the cauſe order to be carried on.

Sidney

29 Oct. 1782. Lord Thurlow C.

Sidney v. *Perry.*

If a defendant pleads to relief, and anſwer as to the diſcovery ſought by the bill, it is regular to except to the anſwer, before the plea is argued.

BILL for relief and diſcovery: the defendant pleaded to the relief, and anſwers as to the diſcovery; the plaintiff took exceptions to the anſwer, and obtained an order, dated 10th *July* 1782, to refer the exceptions: The defendant applied this day, 29th *October* 1782, to diſcharge the order for irregularity; for that the plaintiff could not except, until the plea was argued; but his Lordſhip held it to be perfectly regular, and coincided with the reaſons of the Maſter of the Rolls (*a*).

(*a*) Vid. Pigott v. Mace, ſupr.

4 Nov. 1782. Lord Thurlow C. 1 Bro. C.C. 179. S. C

Burnet v. *Burnet.*

Application for an increaſe of maintenance, regard being had to two children unprovided denied, and reference to ſee, whether it was proper to make any, and what increaſe to the allowance, for the maintenance of the infants.

APPLICATION by Mr. *Scott*, to refer it to the Maſter, to make an increaſe to the allowance for the infants' maintenance; and that he might have regard to two children unprovided; and for that purpoſe he cited, *Lanoy* v. Duke of *Athol*, 2 *Atk.* 444; and *Petre* v. *Petre*, 3 *Atk.* 511, by Lord *Hardwicke*.

Lord *Thurlow* C. ſaid, Lord *Hardwicke*'s opinion was better than his order, and changed the application in the extent prayed; but referred it to the Maſter, to conſider whether it was proper to make any, and what increaſe, to the allowance for the maintenance of the infants.

Brooks

Brooks v. *Reynolds.*

28 May 1782. Lord Thurlow C. 1 Bro. C.C. 183. S. C.

BILL for an injunction, to ſtay a creditor from proceeding at law to recover his debt: A bill had been brought by a creditor, on behalf of himſelf and other creditors; and a decree for an account and payment, and the Maſter to advertiſe for the creditors to come before him; but the defendant in the preſent cauſe *had not* come in under that advertiſement; and therefore he inſiſted, he had a right to proceed for his debt as he thought proper.

Where there hath been a decree for payment of creditors, and the Maſter to advertiſe for them, the Court will not permit a creditor although he hath not gone in under the decree, to proceed at law for his debt.

But his Lordſhip ſaid, as a bill had been brought for payment of debts, and a decree had been made, for taking an account of them and payment, and the creditors might have ſatisfaction under it; he would not permit the defendant to proceed at law, which would be rendering the decree nugatory; and therefore on the plaintiff's ſhewing cauſe for continuing the injunction on the merits, his Lordſhip continued the injunction.

Mr. Solicitor General was counſel for the plaintiff; Mr. *Mitford* for the defendant.

Moore v. *Paſhe*, 26th *June* 1783, the like; *Douglas* v. *Clay*; and *Kenyon* v. *Worthington*, ſupr. were cited; but ſee the caſes of *Dennet* v. *Cole* (*a*), and *Farnham* v. *Burroughs* (*b*).

(*a*) ſupr. 144.

(*b*) ſupr. 63.

Hall

23 Nov. 1782. Lord Thurlow C.

Hall v. *Mulliner.*

The bare filing of exceptions to a report, and not ſetting them down to be argued, is not cauſe againſt confirming the report.

THE Maſter having made his report, the plaintiff obtained the commmon order, to confirm the report, unleſs cauſe was ſhewn to the contrary, and ſerved the defendant with the order; the defendant filed exceptions to the report, and when the plaintiff moved to have the order to confirm the report made abſolute, the defendant would have ſhewn the exceptions for cauſe; but not having obtained an order to ſet down the exceptions to be argued, his Lordſhip conſidered them as merely dilatory, and made the order abſolute; and on application by the Solicitor General, to diſcharge the order, his Lordſhip refuſed the motion.

21 Jan. 1783. Lord Thurlow C.

Rowe v. *Jackſon.*

Where there is an order for a huſband to lay propoſals for a ſettlement on his wife and the iſſue of the marriage, and the wife dies leaving iſſue, the Court will keep the huſband to the order.

UPON application for payment of a wife's legacy, the uſual order was made, for the huſband to go before the Maſter, and ſubmit propoſals to him, for a ſettlement on his wife: before propoſals were laid before the Maſter, the wife died, and the huſband applied this day for his wife's legacy.

Lord Chancellor.—If there be an order, directing a huſband to go before the Maſter, and to lay propoſals for a ſettlement on his wife, and *the iſſue* of the marriage, and the wife dies, leaving children, this Court will not part with the property, but keep the huſband to the order; in this caſe there are iſſue; therefore let the huſband go before the Maſter, and proſecute the order.

Fretwell

Fretwell v. *Kay.*

23 Jan. 1783. Lord Thurlow C.

MOTION on the part of the plaintiff, to transfer exceptions ſet down before the Lord Chancellor, to the Maſter of the Rolls, on a ſuggeſtion, that the cauſe was ſet down to be reheard before him, and therefore it would be convenient: It was ſaid by Mr. *Madocks*, and admitted, that exceptions ought to be ſet down before the Lord Chancellor, but that upon ſpecial reaſons, the Lord Chancellor might order them to be transferred. In this caſe however, the Lord Chancellor denied the motion.

Bowker v. *Hunter.*

28 Jan. 1783. Lord Thurlow C. 1 Bro. C.C. 328, S. C.

Unequal legacies to executors, the reſidue of the teſtator's perſonal eſtate being undiſpoſed, held they were intitled to ſuch reſidue; the giving to them unequal legacies, manifeſting that it was the intention of the teſtator, that one ſhould have more than the other.

THE teſtator by his will, gave many legacies, among which, were ſome to his next of kin, and two legacies to his executors, 200 *l.* to one executor, and 50 *l.* to the other; and did not diſpoſe of the reſidue of his perſonal eſtate; the bill was to have an account taken of the teſtator's perſonal eſtate, and of his debts and legacies, to have them paid; and to have the reſidue declared to be undiſpoſed, and to belong to the next of kin, upon the ground, that as the teſtator had given his executors legacies, they were to be conſidered as truſtees of the reſidue or the next of kin.

The caſes cited were, *Blinkhorn* v. *Feaſt*, 2 *Veſ.* 27; *Buffar* v. *Bradlay*, 2 *Atkins*, 220; *Braſbridge* v. *Woodroffe*, 2 *Atk.* 68; *Andrew* v. *Clarke*, 2 *Veſ.* 162; *Newſted* v. *Johnſon*, 2 *Atk.* 45.

Lord

Brander v. Brander.

The Lord Chancellor ſaid, that a teſtator's giving to executors his perſonal eſtate, was unneceſſary; the law threw it upon them, to diſpoſe as he by his will ſhould direct; and if not diſpoſed, they took it in equal ſhares; that knowing this, and meaning that one of his executors ſhould enjoy more of his property than the other, was the reaſon he gave to them unequal legacies. His Lordſhip therefore ſaid he was clear, that the executors notwithſtanding they had legacies, were entitled beneficially, to the clear reſidue of their teſtator's perſonal eſtate; and ordered the bill to be diſmiſſed.

The above cauſe was reheard before the then Lords Commiſſioners for the cuſtody of the Great Seal, on the 8th day of *November* 1783, and on the 22d of the ſame month; when judgment was given, and the diſmiſſion was affirmed.

In addition to the caſes cited on the original hearing, there were cited, *Foſter* v. *Munt*, 1 *Vern.* 473; *Pring* v. *Pring*; *Cordel* v. *Noden*, 1690, 2 *Vern.* 148; *Bailey* v. *Powel*, *Prec. in Chan.* 92, 6 *December* 1798, *Reg. Lib. A.* 87; *Darwel* v. *Bennet*, 2 *Vern.* 667, *Reg. Lib. A. fol.* 466, *Reg. Lib. A.* 516, 1 *P. Wms.* 544, 10 *Mod.* 442; *Batchelor* v. *Searle*, 2 *Vern.* 736; *Lawſon* v. *Lawſon*, 25 *April*, in Houſe of Lords (*a*); *Ball* v. *Sevill*; *Ibbotſon* v. *Bothwick*; *Smith* v. *Hungerford*.

(*a*) 7 Bro. P. C. 511.

A pecuniary legacy to a legatee affords a preſumption, that ſuch legacy was all the teſtator meant he ſhould have of his property.

The firſt diſtinction attempted on the quantity of a legacy, was in *Griffith* v. *Rogers*, 1704 (*b*); Ducheſs of *Beaufort* v. Lady *Granville*, 1709, (*c*).

(*b*) 1 Eq. Ca. Abr. 245.
(*c*) 1 Bro. P. C. 305.

If

If there be a ſpecific inſtead of a pecuniary legacy, there is a diſtinction on that head. *Bowker* v. *Hunter.*

Another on the nature and quantity of the legacy; as in *Bull* v. *Smith.*

Another diſtinction was taken, upon the condition of the executors, and other legatees, as a wife, and a near relation, and next of kin remote.

Another diſtinction was taken, where a legacy was given to an executor, and legacies to the next of kin, in which it was argued, that the teſtator had pointed out what the next of kin were to have, and no more. *Vachel* v. *Jefferys.*

Upon the whole, their Lordſhips concurred in idea with the Lord Chancellor, that the teſtator, by giving the executors unequal legacies, meant that one ſhould enjoy more of his property than the other: And therefore affirmed the decree.

Bell v. *Maidman.*

1783.
Lord Thurlow C.

ON the marriage of Mrs. *Webb*, with the defendant *Webb*, by ſettlement, the eſtate being the wife's, two terms were created: one for the raiſing of portions, which the truſtees were to raiſe by rents and *profits, or* by *mortgage or ſale*; the other a term for ninety-nine years, for payment of debts. It was inſiſted that it was confined to rents and profits, and that there is a diſtinction between general profits, and rents and profits. The queſtion therefore was, whether the debts *were to be paid by rents and profits*, or money to be raiſed *by mortgage*, for that purpoſe.

Qu. Under a term, whether debts to be paid by *annual* or *general profits*? held to be by *general profits.*

Caſes

Bell v. *Maidman.*

Caſes cited: *Ivie* v. *Gilbert*, 2 *P. Wms.* 13; *Evelyn* v. *Evelyn*, 2 *P. Wms.* 659; *Ravenhill* v. *Danſey*, 2 *P. Wms.* 179; *Hellier* v. *Jones*, *Eq. Ca. Abr.* 337; *Mills* v. *Banks*, 3 *P. Wms.* 1; *Green* v. *Atkins*, 505; Anonymous caſe before Lord *Nottingham*, in 1682, 1 *Vern.* 104; *Warburton* v. *Warburton*, 1701, 2 *Vern.* 420; *Brown's Parliamentary Caſes*, 34, 1 *P. Wms.* 418, 2 *P. Wms.* 19; *Raines* v. *Dixon*, 1 *Veſ.* 41; *Combe* v. *Acland*, by Lord *Hardwicke*, 1740; *Collier* v. *Leeds*, 6th *July* 1769, returned 10th *Nov.* 1770, and *affirmed.*

In Hilary 1783, the Lord Chancellor gave judgment, and was clearly of opinion, the debts were to be paid by *general profits*, and reverſed ſo much of the decree of *M. R.* as directed an account of rents and profits, and the application of them to pay debts; and directed the principal to be raiſed by mortgage.

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6 Feb. 1783. Lord Thurlow C.

Phipps v. Biſhop of *Bath* and *Wells.*

A second mortgagee cannot have a receiver, the mortgagor living, without the conſent of the firſt mortgagee, becauſe the Court cannot prevent the firſt mortgagee from bringing an ejectment againſt the receiver, as ſoon as he is appointed.

APPLICATION by the Attorney General, on behalf of a ſecond mortgagee, the firſt mortgagee declining any ſteps to get into poſſeſſion, to have a receiver appointed; and that he might apply the rents in keeping down the intereſt of a mortgage, and of 10,000 *l.* charged on the eſtate; and to pay the ſurplus rents into the Bank.

Lord Chancellor.—A ſecond mortgagee, the mortgagor living, cannot have a receiver, without the conſent of the firſt mortgagee; becauſe the Court cannot prevent the firſt mortgagee from bringing an ejectment againſt the receiver, as ſoon as he is appointed.

Sydolph

Sydolph v. *Monkſton.*

6 March 1783.

IT was held by Lord *Thurlow* C. that if defendants anſwer ſeparately, exceptions muſt be taken to each anſwer.

Croſley v. *Marriot.*

28 April 1783. Lords Commiſſioners Lord Loughborough and Sir William Aſhhurſt.

THE plaintiff had obtained a judgment againſt two of the defendants, on a penal ſtatute, not bailable, which could not be entered up until ſome time in the following term; one of the defendants was in priſon for debt; the other, who was ſolvent, was ſelling his goods, and threatened to go abroad: The plaintiff applied this day, for a *ne exeat regno*; but the demand being entirely legal, and though one of the defendants threatened to go abroad, yet as the judgment might be executed upon the other, their Lordſhips refuſed the motion.

Ex parte *Carter.*

15 March 1783. Lord Thurlow C.

A. MORTGAGES to *B.* in fee; *B.* died inteſtate; left *C.* his widow, (who obtained letters of adminiſtration, &c.) and *D.* his ſon and heir at law an infant, (whether he had any more children did not appear); the mortgagor wanting to redeem, applied under the act of the 7th of Queen *Ann*, and obtained the uſual

The mortgagee of a mortgage in fee dying inteſtate, and his heir being an infant, and one of his next of kin, conſequently entitled to a ſhare of the mortgagemoney; of queen Ann, Chancellor upon directed him to

the Maſter would not find him to be an infant mortgagee, within the ſtatute of 7th for that he was not, as he conceived, a mere naked mortgagee, but the Lord it's ſtanding over to conſider it, was clear he was a mortgagee within the act, and convey.

Ex parte *Carter.*

order, to refer it to the Maſter, to ſee if the infant heir was a truſtee, or mortgagee within the ſaid act: The Maſter found the ſaid infant *not* to be a truſtee, or mortgagee, within the act; for that he was *not a mere* naked mortgagee, but had an intereſt in the mortgage money, as it might make part of the general reſidue of the inteſtate's, the mortgagee's, perſonal eſtate, to a ſhare of which, the infant, as being one of the next of kin was entitled, and being ſo entitled, and having the ſecurity veſted in him, this Court could not make him part with it, without ſuch his right being preſerved. *A.* the mortgagor preferred his petition to his Lordſhip, praying, that he would, contrary to the opinion of the Maſter, declare the infant to be a mortgagee within the act, and direct him to convey. The petition came on the 20th of *January* 1783, and ſtood for judgment, till the 15th of *March* 1783.

Per Curiam.—Till the paſſing of the above act, if the real eſtate chanced to deſcend, or came to an infant, the mortgagor could not have his eſtate again, until ſuch infant attained twenty-one: To remedy that inconvenience, the Legiſlature paſſed the act, and all that is intended by it is, upon the reſult of a reference, to enable the Court to put ſuch infant into the ſtate of an adult: What an infant's intereſt in the mortgage money may be, the Court cannot enter into under this proceeding, and *primâ facie*, it is part of the inteſtate's general aſſets to be adminiſtered, in the hands of the adminiſtratrix; to ſay that it is part of a reſidue, is abſurd, till an account of his perſonal eſtate, and of his debts hath been taken, and that cannot be, but under a decree, in a ſuit inſtituted for

for that purpoſe: And therefore as I cannot take notice of any beneficial intereſt the infant may have, I am clear he is an infant mortgagee within the act; and let him convey purſuant to it.

Ex parte *Carter*.

Bowker v. *Hunter*.

1 July 1783. Lords Commiſſioners. 1 Bro. C. C. 328. S. C.

THE parties had entered into an agreement, to abide by ſuch decree as ſhould be made upon the merits, and that there ſhould be no appeal; which was made an order of Court: The cauſe was heard, and a decree pronounced. Notwithſtanding the above agreement, an order was obtained to rehear the cauſe: On application to diſcharge the order, their Lordſhips refuſed it, upon the ſame grounds as in the caſe of *Buck* v. *Fawcett*, 3 *P. Wms.* 242, that the Court is concerned to ſet right any error.

The cauſe reheard notwithſtanding the parties had entered into an agreement, which was made an order of Court, not to rehear the cauſe.

Devie v. Lord *Brownlow*.

23 July 1783. Lords Commiſſioners.

PLEA of a former ſuit depending, which was ſaid to be for the ſame matter.

Lords Commiſſioners.—The pleading a former ſuit for the ſame matter, and ſtating the pleadings and proceedings, and that the matter is ſtill depending, is not ſufficient, except there be an *averment*, that the preſent, and former ſuit are for the ſame matter: Therefore overrule the plea.

In pleading a former ſuit, it is neceſſary to aver that the preſent and the former ſuit, are for the ſame matter.

29 Oct. 1783. Lords Commiſſioners.

Ex parte *Barker.*

A SIMILAR application, and a ſimilar order, as in *Blake* v. *Blake*, ſupr. 459. with this difference, that the infant had teſtamentary guardians, and her mother was in the *Eaſt Indies*.

8 Nov. 1783.

Gartſide v. *Iſherwood.*

The diſtinction between a bill of review, and a ſupplemental bill in nature of a bill.

THIS cauſe came on the above day, upon an application by the defendant, for a new trial of an iſſue directed in the cauſe, which being denied, he applied by petition, to file a ſupplemental bill in nature of a bill of review, in order to introduce newly diſcovered matter; but it was objected, the decree was not inrolled: Upon which two doubts aroſe, Firſt, whether a defendant could inrol a decree; Secondly, whether a defendant could file a bill of review, or a ſupplemental bill in nature of a bill of review: And the Court doing me the honour, to require my thoughts, I ſubmitted to Lord Commiſſioner *Loughborough* in writing what occurred to me, of which the following is a copy:

"As to the firſt queſtion, whether a defendant can inrol a decree; it was held by Lord *Hardwicke*, that a defendant may, in *Carrington* v. *Holly*, 12th *July* 1755: The bill was to eſtabliſh the plaintiff's claim to an eſtate: upon hearing the cauſe an iſſue was directed; before it was tried, the plaintiff upon *motion*, without notice, obtained an order to diſmiſs his own bill with coſts: The defendant applied the above day to diſcharge

charge the order for irregularity, upon the ground, that the cauſe having been brought on to hearing, the bill could not be diſmiſſed, but by a ſolemn judgment." Lord Chancellor.—" There hath not been any determination. The directing an iſſue, is merely to inform the conſcience of the Court; the iſſue hath not been tried, and until there hath been a determination, I hold the plaintiff, be the cauſe in what ſtage it may, may diſmiſs his bill upon payment of coſts: Therefore take nothing by the motion. But his Lordſhip added, had there been a decree, it would have been otherwiſe, for that all parties had an intereſt in a decree; and any party might take ſuch ſteps as were adviſed to have the effect of it; ſo likewiſe his Lordſhip ſaid it would have been, had the iſſue been tried, and determined in favour of the defendant; he might have ſet it down on the equity reſerved, in order to obtain a formal diſmiſſion of the bill, and to inrol it as a final judgment, and thereby make it pleadable." *Garſide v. Ilderwood.*

His Lordſhip ſaid, the language of orders directing iſſues ſhewed it; for after directing the iſſue, the order goes on: 'And reſerve the conſideration of coſts, 'and of all further directions, until after the ſaid trial; 'and any of the parties, (not confining it to the plaintiff), are to be at liberty to apply to the Court, as 'they ſhall be adviſed.' As to the doubt, whether a defendant could file a bill of review, or a ſupplemental bill in nature of a bill of review, the order on hearing not being inrolled; it is ſubmitted, as the order only directs an iſſue, and is no determination, it is not neceſſary to inrol it, the application of the defendant not being to review for error, but to intro-

Cowper v. Cowper. dence by way of ſupplement, matter come to his knowledge, ſince the order on hearing; and were it inrolled, it would make no difference in point of expence, as he muſt make a depoſit of 50*l.* on either bill.

The diſtinction between a bill of review for error apparent, and a ſupplemental bill in nature of a bill of review, with the greateſt deference, I take to be, where there is error apparent, in the judgment of the Court, upon the facts and circumſtances the Court was poſſeſſed of at the time of pronouncing it, and when the decree is inrolled, the only way a party hath to correct and ſet it right, is by bill of review, 1 *Chan. Caſes*, 54; *Taylor* v. *Sharpe*, 3 *P. Wms.* 371; and ſuch bills may be filed, without leave of the Court, upon making the uſual depoſit of 50*l.* *ordo curiæ* 1700, in the ſame manner as a party files exceptions to a report; but no matter other than what was before the Court, at the original hearing, can be introduced under ſuch a bill, becauſe a party cannot enter into a new examination of evidence, 1 *Roll's Abridg.* 382; but where a diſcovery hath been ſince a decree of matter, or a fact *in eſſe* at the time of pronouncing it; the party muſt apply for leave, to file a bill, to bring it before the Court, *ordo curiæ* by Lord *Hardwicke*, 17th *October* 1741, the Court requires to be ſatisfied, that the matter alleged to be newly diſcovered, was not at the time of the hearing in the knowlege, either of the party, or his ſolicitor or agent. If the order or decree hath been inrolled, the language of the order, 'Let the party applying be at 'liberty to file a bill of review for the purpoſe of, &c.'

If

If it is not inrolled, the Court if ſatisfied, permits the party to file a bill, by way of ſupplement, merely for the purpoſe of introducing, and bringing before the Court, the newly diſcovered matter; which cannot be done by a petition for a re-hearing; the orders that are made on ſuch applications ſpeak it: 'Let the 'party on depoſiting 50*l.* with the Regiſter, be at li-'berty to file a ſupplemental bill in nature of a bill 'of review, in order to ſtate, that, &c.' and to pray relief; and let the be at liberty to apply to rehear the original cauſe, and to bring it on at the ſame time.

Lockart v. *Raper*, 19 *Dec.* 1766, Reg. Lib. B. 42; liberty given to file a ſupplemental bill, in order to ſtate the right of the plaintiff, upon the fact of his having ſuch other child by *Sarah Lockart*, and to pray relief.

Dalzell v. *Bliſſet*, before Lord *Bathurſt* C. 21ſt *Dec.* 1770, Reg. Lib. B. 47. *Curia.* Upon the defendant the petitioner, depoſiting 50*l.* with the Regiſter, let him be at liberty to file a ſupplemental bill in nature of a bill of review, in order to ſtate the right of the party, upon the foot of, &c. and for relief; and the parties are to be at liberty to apply to ſet down the original cauſe to be reheard, and to come in at the ſame time.

Stephens v. *Hanbury*, before Lord *Thurlow* C. 20th *December* 1782; application by the defendant, to file a ſupplemental bill in nature of a bill of revivor againſt *John Stevens*, the plaintiff in the original cauſe, adminiſtrator of *Richard Stephens* deceaſed, and alſo adminiſtrator *de bonis non* of *Williheimina Ann Stephens*,

Curtiſide v. *Iſherwood.*

the late wife of the ſaid *Richard Stephens*, ſtating thoſe facts, &c. and praying relief; which was ordered upon the uſual terms, and liberty given to apply to rehear the original cauſe.

I laid this before Lord Thurlow upon a ſimilar queſtion put to me by his Lordſhip, and he acceded to it. J. D.

Lord Commiſſioner Lord *Loughborough* handed what I had delivered to him, to the Bar; it met the ideas of his Lordſhip, and the whole Court; the conſequence was, that the Court received a petition of the defendant, to file a ſupplemental bill in nature of a bill of review; but not being able to ſatisfy the Court, he was not appriſed of what he now wanted to introduce, at the time of the decree, the petition was diſmiſſed.

10 Nov. 1783. Lords Commiſſioners Lord Loughborough, Judge Aſhhurſt, and Mr. Baron Hotham.

Whittington v. Attorney General.

A BILL of review, impeaching the judgment of Lord *Camden* C. reſpecting the eſtates given for the purpoſe of founding a College at *Cambridge*, by the will of Sir *George Downing*; the defendant demurred to the bill of review; the demurrer was ſet down to be argued: The gentlemen of eminence in all the Courts at *Weſtminſter* were engaged; and it ſeemed to be agreed on both ſides, that it would take the whole Term to hear and determine it, Mr. Serjeant *Hill* ſaying he ſhould take at leaſt three days, in ſtating and arguing from his caſes. On the 7th of *Nov.* 1783, Mr. opened the demurrer of *Barter*; on the 10th of *November*, Mr. *Graham* opened the demurrer of the Univerſity of *Cambridge*; when Lord *Loughborough* addreſſed the Bar; ſaying, the Court had heard the matter

It being agreed by both parties, that the hearing and determining the demurrer in this cauſe, would take the whole term; and each ſide being determined to carry it afterwards to the Houſe of Lords, the Lords Commiſſioners allowed the demurrer without giving the leaſt ſcintilla of opinion.

matter before them was to employ the whole Term, and likewiſe, that whichever way it was decided, it was the determination of one or other of the parties, to carry the caſe before the Houſe of Lords; and it being ſo admitted, his Lordſhip ſaid it would be waſting a great deal of time to no end; and that a great inconvenience would ariſe from it; the ſuitors whoſe cauſes were to be heard, would be greatly delayed; and therefore with the concurrence of his Brother Commiſſioners, he ſhould make a mere naked order, allowing the demurrer, without the leaſt ſcintilla of opinion; which he accordingly did,

Whittington v. Attorney General.

Dove v. *Dove.*

20 Nov. 1783. Before the Lords Commiſſioners. 1 Bro. C.C. 375. S. C.

By the decree, the eſtate of the teſtator was to be ſold, and *all parties* were to join: the defendant the widow, who had got into poſſeſſion, under ſome claim of jointure or dower, and the receipt of the rents and profits, was directed to account: the eſtate was ſold, and the purchaſer ſerved the defendant the widow, (in whom there was no legal eſtate from her huſband), with a writ of execution of the decree, and applied to her to join in the conveyance, and to *deliver* poſſeſſion; which ſhe refuſing or neglecting to do, he iſſued an attachment againſt her, and ſhe was arreſted upon it; and on the 15th of *November* he moved of courſe, and obtained an order for a writ of aſſiſtance; but there not having been the previous order to enjoin her to deliver poſſeſſion, I objected to draw it up; upon which the plaintiff acquainted the Court with my objection; the Court allowed my objection, and

Courſe of proceeding to be obſerved, previous to an application for a writ of aſſiſtance.

Dove v. *Dove.*

and on the 20th of *November*, the plaintiff changed his motion, and moved for, and obtained an order for an injunction, to enjoin the defendant to deliver poſſeſſion; but there not having been any previous and direct order for the defendant to deliver poſſeſſion, only the words of the decree, for all parties to join, which the plaintiff ſaid implied it; but which, as it appeared to me, was only to give the purchaſer a title, I again objected, and they again acquainted the Court with my refuſal to draw up the order; and the Court requiring my reaſons, I ſubmitted to Lord *Loughborough* the following obſervations:

There are certain writs or proceſſes of contempt, that iſſue out of Chancery, to obtain which, particular and eſtabliſhed rules are to be obſerved; there are ſome that are made out of courſe, by the Clerk in Court, and paſs the Great Seal, without an order, to wit, attachments, attachments with proclamation, commiſſion of rebellion; others there are, amongſt which, is a writ of aſſiſtance, that do not iſſue without an order.

To ground an attachment againſt a party, ſervice and diſobedience of ſomething under the Great Seal, (ſubpœna or order) muſt be proved; which being proved by affidavit, an attachment iſſues. Lord *Bacon*'s 77th order.

There are inſtances in which attachments *are not to be executed*: One againſt an infant for not appearing to a bill filed againſt him, which is iſſued merely to ground an order, for a meſſenger to bring an infant into Court, to have a guardian aſſigned him. *Perkins* v. *Hammond*, 5 *June* 1746, by Lord *Hardwicke*:

the other is, the attachment that is iſſued, for not obeying a writ of execution of an order, to deliver poſſeſſion of land, which is iſſued merely for the purpoſe of obtaining an order, for an injunction to enjoin the party to deliver poſſeſſion; ſee *May* v. *Hook*, *June* 1773, by Lord *Bathurſt* C. the plaintiff had unadviſedly executed the attachment, and had the defendant in priſon: His Lordſhip ordered the defendant to be diſcharged with coſts, after hearing counſel on both ſides, and upon conſideration: The defendant afterwards would have brought an action for falſe impriſonment; but this his Lordſhip reſtrained him from doing, upon the ground that this Court will puniſh its own officers, agreeably to a caſe, in 1 *Vern.* 269; where it is ſaid, 'the irregularity of ſerving the proceſs of the 'Court is only puniſhable here; and therefore an 'injunction lies, to ſtay proceedings at law, for irre-'gularity.' *Dove* v. *Dove.*

A writ of aſſiſtance muſt be applied for, becauſe the Court is to be ſatisfied that the ſteps requiſite to be purſued have been followed: they are theſe, firſt, the ſervice of a writ of execution, of an order to deliver a demand, and the iſſuing an attachment for diſobeying it.

The next is an injunction to enjoin the defendant to deliver poſſeſſion, (which affects the tenant), and which the order for the defendant to deliver poſſeſſion, doth not, as is ſaid in *Venables* v. *Foyles*, 12 *Car.* 2. Lib. fol. 260.

The order for the injunction is of courſe, upon affidavit of ſervice of a writ of execution of the order for the defendant to deliver poſſeſſion, demanding poſſeſſion, refuſal, and the iſſuing the attachment.

Upon

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Upon proof of ſervice of the injunction, and it's not having been complied with, upon motion without notice, and reading an affidavit of the facts, a writ of aſſiſtance will be ordered.

The firſt I have hitherto been able to meet with, is *Ruſſel* v. *Boderille*, 12 *Car.* 2. Lib. B. fol. 38. an order for a writ of aſſiſtance grounded on an injunction to deliver poſſeſſion: not obeyed.

Underhill v. *Whichcote*, the ſame year, and book, fol. 460.

Venables v. *Foyles*, the ſame year, and book, fol. 670. a ſimilar order upon the ſame grounds. Note: In this a queſtion aroſe, reſpecting the regularity of the proceedings, which was referred to the two ſenior Six Clerks, not towards the cauſe, (at that time the cuſtom), who certified the ſame to be regular.

Darlow v. *Bradgate*, 18th *July*, 11 *William* 3d. the like.

Milward v. *Milward*, 14th *July*, 8th of Queen *Ann*; motion for an injunction: 20th of ſame month, order for a writ of aſſiſtance.

Noble v. *Wilſon*, 12th *February* 9 *Geo.* 1. order for an injunction: 20th of ſame month, order for a writ of aſſiſtance.

Done v. *Holt*, 10th *December*, 2d *Geo.* 2. a writ of aſſiſtance denied, becauſe an injunction had not iſſued, to deliver poſſeſſion, which was then ordered; and on the 14th of *January* following, a writ of aſſiſtance was ordered.

Stribley v. *Hawkins*, by Lord *Hardwicke*, 28th *November* 1744, and in 3 *Atkins*, 275. His Lordſhip ſaid, 'a writ of injunction muſt firſt iſſue, and be 'ſerved, before you can have a writ of aſſiſtance.'

The

The following is the form of an order for an injunction to deliver poſſeſſion:

"Upon motion, &c. it was alleged, that by the decree or order, dated it was ordered, that the defendant ſhould deliver poſſeſſion of the land, &c. to the plaintiff; that the defendant who is in poſſeſſion of the ſaid land, was ſerved with a writ of execution of the ſaid order, and the plaintiff required him to deliver poſſeſſion, which he refuſed; and thereupon an attachment hath iſſued againſt him, (doth not ſay it was executed) and therefore it was prayed, that an injunction may be awarded againſt the defendant, to deliver poſſeſſion of the ſaid land, &c. which upon hearing an affidavit (of the facts) read, his Lordſhip held to be reaſonable, and doth order the ſame accordingly."

It was before obſerved, that the attachments that iſſue for diſobedience of a writ of execution, of an order to deliver poſſeſſion, are not executed: in the caſe before the Court, it hath been executed, (which is wrong according to the cuſtom of the Court), and the order of Lord *Bathurſt* in *May* v. *Hook*; and the more ſo, as it is for diſobeying a writ of execution of a decree in not delivering poſſeſſion, which the decree doth not direct, and they have no order."

On the 22d of *November* 1783, Lord *Loughborough* told the Bar, that he and his Brother Commiſſioners had conſidered the obſervations laid before them: that they were convinced by them, and directed me not to draw up the order for an injunction, that was made on the 20th of the ſame month; and added, that previouſly to the plaintiff's purſuing the regular courſe, they

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they expected the plaintiff ſhould releaſe the defendant from her confinement, under the attachment.

The plaintiff afterwards purſued the regular ſteps, and obtained a *writ of aſſiſtance*: but *query* as to the propriety: the decree was for a ſale, and *all* parties to join, not for the defendant or any one to deliver up: the defendant was in poſſeſſion, not under the will, but on a ſuppoſed right in herſelf: the purchaſer was in the ſituation of every other purchaſer; he either could have a title or not; if a title could be made when he had a conveyance, he might take the proper ſteps to obtain poſſeſſion, and the Court would aſſiſt him, as far as was conſiſtent with its rules: It might happen, that a purchaſer, ſenſible a good title could not be made, might purchaſe at an under value, and run the riſque, and by this mode of proceeding, obtain that in this Court, which he could not by an ejectment, and having got the poſſeſſion, lay the *onus* upon thoſe, who were ſo turned out of poſſeſſion, to ſhew a better title.

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24 Jan. 1784.

Rowley v. *Ridley.*

Tenants ordered to attorn to ſequeſtrators in meſne proceſs; but which his Lordſhip afterwards would not enforce.

THE defendant in contempt to a ſequeſtration, to meſne proceſs, for want of an anſwer; and the tenants of the eſtate ſequeſtered, refuſing to attorn, Mr. *Mitford* moved, at the riſing of the Court, (when it was ſcarcely poſſible to hear, much leſs to underſtand), as of courſe, that the tenants might be ordered to attorn to the *ſequeſtrator*, which paſſed, as other motions of courſe do. Seeing what the order was, when

when the inſtructions for it were left with me, I declined delivering it, and mentioned my doubt as to it's propriety, to Lord *Loughborough*, who was then one of the Lords Commiſſioners for the cuſtody of the Great Seal, and his Lordſhip having deſired me to lay before him my reaſons, and the diſtinction between ſequeſtrations in meſne proceſs, and for a duty; I ſubmitted to him the following, which his Lordſhip handed down to Mr. *Mitford*, and as I underſtand, he and many others, have copied them: how far I was right, reſts with them.

"There are in the different Courts in *Weſtminſter Hall*, certain rules and forms, to be obſerved in the courſe of proceeding in the reſpective Courts: length of time and experience evince them to be wiſe and expedient; to deviate from them is hazardous; as it is impoſſible to ſee where it will end, and it may be the means of occaſioning that confuſion, which thoſe rules were well calculated to prevent."

"In the Court of Chancery, there is a proceſs of contempt, called a ſequeſtration; of which there are two ſpecies."

"One being in *meſne proceſs*, merely to ground a further proceeding."

"The other for *a duty*, which, as is ſaid in Attorney General v. Mayor of *Coventry*, 1 *P. Wms.* 306, is the execution, and life of a court of equity, and the fruit of a long ſuit; and is *ad ſatisfaciendum*, and not bailable, as was ſaid by Lord *Hardwicke* C. in *Kinſey* v. *Tardley*, the 24th of *November* 1753, and by Lord *Bathurſt* C. in *Meadows* v. Lady *Falmouth*, 10th *July* 1781."

Sequeſtrations

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"Sequeſtrations were at firſt, laid on the thing in queſtion, and afterwards extended to the effects in general of the contemnor."

"Sequeſtrations for duty decreed, are antient, as will appear from *Tothil*, p. 273, where there is a long liſt of ſequeſtrations for duty, but none in meſne proceſs; which are more modern."

"To ground a ſequeſtration, there is a certain line of proceſs to be purſued:"

"An attachment."

"An attachment with proclamation."

"A commiſſion of rebellion."

"An order for the Serjeant at Arms to go: If on either of theſe, the contemnor is taken, he is brought into Court, and turned over to the Fleet; if in contempt for a duty, a ſequeſtration will then iſſue; if in meſne proceſs, the defendant is brought into Court; firſt on an *habeas corpus*, &c. an *alias habeas corpus*, and a *pluries habeas corpus*, and an *alias pluries habeas corpus*, and the plaintiff's clerk is ordered then to attend with the record of the plaintiff's bill; and if he perſiſts in his contempt, the Court will decree the bill to be taken *pro confeſſo* againſt him; and thereupon he is diſcharged as to that contempt, paying the coſts of it."

"Should a defendant ſo in contempt on meſne proceſs, not be taken on any of the above proceſſes, and the Serjeant at Arms return *non eſt inventus*, which muſt be, a ſequeſtration iſſues, which being perſonal, and being only to ground a further proceeding, is not to be executed, as was ſaid by Sir *Thomas Clarke* M. R. (who was allowed to be an excellent law hiſtorian, and well knew the forms, and practice), in

Heather v. *Waterman*, 16th *February* 1762, the bill was for an account of tythes, and that the defendant might pay what ſhould be found due from him; the defendant being in contempt to a ſequeſtration in meſne proceſs for want of his anſwer, which the ſequeſtrators had executed; the plaintiff preferred a petition, praying, that the ſequeſtrators might account, which was heard at the ſame time with the cauſe; and although his Honour decreed the bill to be taken *pro confeſſo*, and would of courſe have decreed coſts; yet as the plaintiff had executed the commiſſion of ſequeſtration, and now prayed the ſequeſtrators might account; he reſerved coſts. After reprobating the meaſure as improper, and what ſhould not have been done, he reprehended the ſolicitor in very ſevere terms; his Honour ſaid, that if he, the ſolicitor, through ignorance of his duty, ordered the ſequeſtrator to execute the ſequeſtration, it was ſhameful; if knowing his duty, he acted contrary to it, it was worſe: As it muſt be then done with deſign, knowing, that if the ſequeſtrators executed the ſequeſtration as they had, they would have to account; that he as ſolicitor would have to ſee the account taken; and that whoever ſuffered, he would be ſure to gain, for he would not fail to charge for his time and attendance: This decree was not proſecuted. *Rowley* v. *Ridley.*

Vaughan v. *Williams*, 1ſt *December* 1762. Bill decreed to be taken *pro confeſſo* on a ſequeſtration, for want of an anſwer, which had been executed, held to be unneceſſary and improper: Decree was for the defendant to pay to the plaintiff 770*l.* received for his uſe.

A ſequeſtration in meſne proceſs is, as hath been ſaid, not to be executed, but drops as ſoon as the

Rowley v. *Ridley.*

purpoſe for which it iſſued, is attained; and the effect of which, he may have in the courſe of a term; for having obtained the ſequeſtration, he may ſet down and hear the cauſe, as a ſhort cauſe, for the laſt day of cauſes in Term, in Court, or at the Rolls the ſecond day after; which plainly ſhews, how unneceſſary it is to execute a ſequeſtration, and if it be executed, what is the object of executing it.

That a ſequeſtration in meſne proceſs, is merely perſonal, is likewiſe evident; for if the party dies, it drops and is gone; whereas if a party dies who is in contempt to a ſequeſtration for a duty, it only abates; and is revived with the ſuit; and ſo it was determined in *Burdet* v. *Rockey*, 2 *Vern.* 58; *Hawkins* v. *Crook*, 3 *Atkins*, 594, 2 *P. Wms.* 556; and by Lord *Hardwicke* in *Hyde* v. *Greenhill* (*a*), 4th *Auguſt* 1748, *Hyde* v. *Forſter* (*b*), 9th *February* 1748; *Wharam* v. *Broughton* (*c*), 17th *December* 1748.

(*a*) Supr. 106.
(*b*) Supr. 102.
(*c*) Supr. 137.

The queſtion now reſting for your Lordſhip's opinion, ariſes upon the Regiſter's heſitating to draw up an order upon an application moved, as if of courſe, that tenants might attorn to the ſequeſtrators, named in a commiſſion of ſequeſtration in meſne proceſs. The application appearing to him novel, not having in the courſe of forty-ſeven years practice or experience, ſeen or heard of ſuch an order, and recollecting what was ſaid by Sir *Thomas Clarke* as before ſtated, upon a party's executing a ſequeſtration in meſne proceſs; and alſo what was laid down by Lord *Hardwicke* in *Wharam* v. *Broughton*, 17th *December* 1748, founded on the caſes of *Burdet* v. *Rockey*, 1 *Vern.* 58. 118; *Hawkins* v. *Crook*, 21ſt *December* 1747; and alſo recollecting what is laid down in *Gibſon* v. *Scevington*,

1 *Vern.* 247; that ſequeſtrators in meſne proceſs, are to retain only to anſwer the contempt: and not comprehending, if the contemnor will pay the coſts, why it ſhould be executed, he thought it his duty to ſubmit the propriety of the application to the Court. It is true, a ſingle precedent in a cauſe, *Wood* v. *Adams*, dated the 2d of *November* 1780, hath been produced to the Regiſter, but that being where the ſequeſtration *was for a duty*, it rather ſtrengthened his doubt; and it being mentioned to him, that the Maſter of the Rolls Sir *Thomas Sewel*, granted the motion after a fortnight's conſideration, was a confirmation that it was novel, and that it was not of courſe. *Rowley* v. *Ridley.*

In ſupport of the motion, five or ſix caſes in the courſe of a century, ſome only dicta's, have been mentioned; with ſubmiſſion, they only ſhew, that ſequeſtrators having executed the commiſſion, were (as it was neceſſary they ſhould be), directed to account; but ſuch orders do not prove that it was right to execute the commiſſions.

That there ſhould be ſo very ſmall a number of caſes in ſuch a length of time, for ſequeſtrators under a a ſequeſtration in meſne proceſs to account, is rather evidence to the contrary, for at leaſt there are twenty or thirty ſequeſtrations in *meſne* proceſs every year; and if it were neceſſary, ſuch ſequeſtrations ſhould be executed, and if they did not drop of courſe, paying the coſts of the contempt, when the purpoſe for which they iſſue is anſwered, the ſequeſtrators, as they are officers of the court, would be to account, and to act under the orders of it; and there would be an order or two every Term for that purpoſe; and yet, if the Gentlemen of the Bar ſhould be applied to, it is apprehended, there would not be one in twenty,

Rowley v. Ridley.

that could ſay, he moved two motions, for ſequeſtrators in meſne proceſs to account, in the whole courſe of his practice.

As to the caſe of *Maynard* v. *Pomfret*, 3 *Atk.* 468, the reporter muſt certainly have miſtaken Lord *Hardwicke*'s ideas; the language of an order for a ſequeſtration ſhews it; the order after ſtating the defendant's contempt, 'directs a commiſſion of ſequeſtration to 'iſſue, directed to certain commiſſioners to be therein 'named, to ſequeſtrate the defendant's perſonal eſtate, 'and the rents, iſſues, and profits of his real eſtate, 'until he ſhall fully anſwer the plaintiff's bill, and this 'Court make other order to the contrary.' By the defendant's not anſwering the bill, he tacitly aſſents to it, or confeſſes it, and the plaintiff is decreed the whole relief he prays. As to continuing the ſequeſtration, as was argued, till it was ſeen, whether the defendant would be guilty of any future contempt, it is extraordinary; ſhould he afterwards be in contempt for breach of the decree, it is a new offence; a new ſequeſtration muſt be applied for, and the order for it would be, until he *doth what the decree* directs him, or until further order.

But were it as Mr. *Atkins* ſtates, it would be oppreſſive, it would be cruel; for inſtance, ſuppoſe a bill to open a general account between merchants, and the bill had been taken *pro confeſſo* under a ſequeſtration againſt the defendant for want of his anſwer, and he was decreed to account, and to pay what ſhould be found due from him; it might be five or ſix years or more, before that account was taken, and it might then turn out, that the balance was due to, inſtead of being due from the defendant; and to keep the

the defendant's property in general, in the hands of the ſequeſtrator, till the account was taken, or the event known, the man might, in the mean time, be reduced to beggary; and therefore it is ſubmitted, that if a ſequeſtration iſſues againſt a defendant, and the plaintiff hath had the effect of it, it drops, and if the defendant is afterwards in contempt for another matter, freſh proceſs muſt iſſue againſt him. *Rowley* v. *Ridley.*

The caſe of *Dupont* v. *Ward* (*a*), though not exactly ſimilar, it is ſubmitted is ſo in principle, and ſhews Lord *Hardwicke*'s ideas to be different. (*a*) Reported ſupr. 133.

Should the Court be of opinion, the application for the tenants to attorn is improper, the plaintiff is not without his remedy, he may apply for, and obtain an order to revive the Serjeant at Arms, and ſo take the defendant into cuſtody.

And ſhould the Court think the application proper, with ſubmiſſion, ſhould it not be made appear, as it is to bring the tenants into contempt, that the ſequeſtrators have ſerved them with a copy of the order, under which the ſequeſtration iſſued, and of the commiſſion in which they are named, as a receiver doth the order and report under which he is appointed?

Had this application for the tenants to attorn been under a ſequeſtration for a duty, and it had been ordered, and the tenants were ſerved with the order, and they refuſed to obey it, the Court perhaps might commit them, and there it would ſtop: for no proceſs of contempt paſſes the Great Seal, but *inter* parties to a ſuit, and the tenants are not ſuch parties.

If the contemnor hath not withheld the eſtate from the ſequeſtrators, and they are in poſſeſſion, why do they not diſtrain, or apply for an order, for leave ſo

Rowley v. *Ridley.*

to do, as a receiver doth; but if they are not in poſſeſſion ſo as to ſuſtain a diſtreſs, by reaſon of the contemnor's witholding the eſtate from them; it is the fault of the ſequeſtrators, that they do not apply for a writ of injunction to deliver poſſeſſion, and follow it with a writ of aſſiſtance.

Were the application, as it is alleged to be, of courſe, it would be in all the orders for a ſequeſtration, (which it is not), as it is in every order, for the Maſter to appoint a receiver, 'that the tenants of the 'eſtate do attorn, and pay their rents to ſuch receiver;' the reaſon ſeems obvious, a receiver is *ad rem*, which the ſuit hath brought under the immediate care and protection of the Court; he is appointed by the Court, that is, by the Maſter, under the direction of the Court, (and exceptions lie to the appointment), and ſo careful is the Court of the property, that the perſon appointed receiver, is firſt to give ſecurity to be approved by the Maſter, to account for what he receives; but as to ſequeſtrations, they are not *ad rem*, but to the property of the contemnor in general; the ſequeſtrators are named by the plaintiff, or the party who applies for the ſequeſtrations; the Court hath no concern in the propriety of the nomination; and they do not give ſecurity for what they may receive: for the above reaſons it is ſubmitted, that ſhould the application be thought proper, upon good grounds, yet it is not of courſe.

The Lords Commiſſioners having delivered up the the Seals, and Lord *Thurlow* being again appointed Chancellor, the motion was revived, and by his deſire, I ſubmitted to him the above reaſons: but being told by Mr. *Miſford*, that Lord Commiſſioner *Aſhburſt* in

in converſation, had told him, he would grant the order, the Lord Chancellor on the 14th *January* 1784, ſaid, that though he ſhould in this inſtance grant the motion, it was not of courſe, and could be granted only upon notice: but afterwards upon the plaintiff's moving, that the tenants might ſtand committed for not obeying the order, his Lordſhip ſaid the ſequeſtration was in *meſne proceſs*, and that the plaintiff muſt remedy himſelf as he could, and refuſed the motion.

Rowley v. *Ridley.*

Smith v. *Bate.*

11 Feb. 1784. Lord Thurlow C.

A TESTAMENTARY guardian having been declared a bankrupt; it was referred to a Maſter to approve of a proper perſon, to have the care of the perſon of the infant.

A teſtamentary guardian being a bankrupt, a perſon appointed to have the care of the ward.

Wilcox v. *Drake.*

5 April 1784. Lord Thurlow C.

THE father being inſolvent, it was referred to the Maſter to approve of a perſon, to have the care of his infant ſon.

The father being inſolvent, a perſon appointed to have the care of his infant ſon.

24 Feb. 1784. Lord Thurlow C.

Speidall v. *Jervis.*

Bill diſmiſſed againſt defendant, though he made default at the hearing.

THE defendant *Jervis* made default at the hearing, but it appearing from the opening of the bill, that the plaintiff had no equity againſt him, the Court notwithſtanding he made default, diſmiſſed the bill, as to the ſaid defendant, but by reaſon of his making default, which is aſſigned as a reaſon in the order, his Lordſhip did not give him coſts.

30 March 1784. Lord Thurlow C.

Baily v. *Ekins.*

IT was laid down by his Lordſhip, that if a man covenant to ſettle his eſtate, and afterwards ſell it, he is only to be conſidered as a truſtee, and a *debtor by ſimple contract*; but if an action of covenant be brought, and judgment obtained, he is a debtor by ſpecialty.

28 April 1784. Lord Thurlow C.

Baker v. *Haily.*

It is not neceſſary in an affidavit on which to ground a writ of *ne exeat regno*, to ſwear the plaintiff is in danger of loſing his demand, by the defendant's leaving the kingdom, it being a ſtrong implication, he doth it with a view to avoid the demand on which a ſuit has been commenced.

MR. *Scott*, moved this day to diſcharge an order for a *ne exeat regno*, for that the affidavit on which it was grounded did not go ſo far as to ſwear the plaintiff would be in danger of loſing his claim, by the defendant's leaving the kingdom; he cited the Practical Regiſter: *Curſus Cancellariæ*; Sir *John Smithſon*'s caſe, 2 *Ventris* 345; *Read* v. *Read*, 1 *Chan. Caſes*, 115; but

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the Lord Chancellor ſaid, though it might have been ſtronger, if the plaintiff had ſworn he ſhould be in danger of loſing his claim; yet as the bill was brought for the demand, the defendant's quitting the kingdom, whereby the Court loſt its juriſdiction, was a ſtrong implication that it was with a view to avoid it, and therefore denied the motion. *Baker* v. *Hally.*

Bradſhaw v. *Toulmin.* 14 May 1784.

LORD *Thurlow* C. ſaid, if two perſons being joint tenants, periſh by one blow, the eſtate will remain in joint tenantcy, in their reſpective heirs. If two perſons periſh by one blow, the eſtate will remain as it was.

Speidel v. *Fuller.* 18 May 1784.

A BANKRUPT having had his Certificate ſigned by the Commiſſioners, was, before ſuch certificate had paſſed the Great Seal, examined as a witneſs; his evidence was offered to be read at the hearing; objection taken to it, for that his certificate had not paſſed the Great Seal: the objection was allowed. A bankrupt's certificate muſt have paſſed the Great Seal before he can be examined as a witneſs.

Ex

9 June 1784. Lord Thurlow C.

Ex Parte *Proctors.*

Eſtate veſted in truſtees by will, to raiſe portions and maintenance for younger children, but no guardian appointed. Application to the Court to appoint guardians and to ſettle maintenance, and to have the coſts of the application. No cauſe being in Court, Lord Chancellor refuſed it, after it's ſtanding over for conſideration.

SIR *William Proctors*, by his will, veſted an eſtate in truſtees to raiſe portions and maintenance for younger children, but appointed no guardian: On application, it was referred to me, to approve of a guardian and to ſettle maintenance; and upon application the above day to confirm the report, they prayed the coſts of the application might be paid.

The Lord Chancellor doubted the propriety of giving coſts, there being no cauſe in Court; and ſuppoſing he was to direct them, how the payment could be enforced; that it was evident the application was meant to juſtify the truſtees, with whom he had nothing to do: but the application being ſaid to be very common, the Lord Chancellor left it to the Regiſter, to ſee if there were any ſimilar orders: one order, and no more, was produced in the ſame matter, which appearing to have paſſed *ſub ſilentio*, I referred them again to the Court, after having talked with Mr. *Madocks*, who agreed as to the impropriety of it; and Mr. *Sprainger* having again introduced it, the Lord Chancellor was clear as to the impropriety of the application, and refuſed it.

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9 June 1784. Lord Thurlow C.

Machin v. *Salkeld.*

Reference to a Maſter, to ſee what was proper to be allowed for the maintenance of a perſon of inſane mind: no commiſſion of lunacy having iſſued: ordered after conſideration.

AN application was made to have an allowance for the maintenance of a perſon of inſane mind. His Lordſhip objected, for that a commiſſion of lunacy had not iſſued, and, without it, he did not ſee how the executors or truſtees could be juſtified; but being

being told the expence of a commiſſion, and the orders, &c. would coſt 120 *l.* and the life-income was no more than 79 *l.* a-year, and having been told there had been ſimilar inſtances, it ſtood over; and *Wilkinſon* v. *Leach*, 23d *July* 1760, *Reg. Lib.* B. fol. 385; *Eldridge* v. *Crouch*, 15th *May* 1782; *Price* v. *Bedford*, 26th *April* 1784; having been laid before his Lordſhip, he, on the above day, referred it to the Maſter, to ſee what was proper to be done, and to enquire into the inſanity of the party. *Mackinv. Salkeld.*

Corbyn v. *Birch.*

7 July 1784. Lord Thurlow C.

The reaſons for ſuing out ſequeſtration againſt a defendant, who is one of the ſworn Clerks of the Court, for not putting in his anſwer, inſtead of applying firſt, as was formerly the practice, for an order to ſuſpend him.

THE defendant *Birch*, one of the ſworn clerks of the Court of Chancery, being in contempt for not putting in his anſwer, it was moved to ſuſpend him; and upon my mentioning to his Lordſhip, that of late years the courſe had been to order a ſequeſtration inſtead of a ſuſpenſion, his Lordſhip deſired me to acquaint him with the grounds for ſuch change in the mode of proceeding: Upon which, I ſubmitted to him what follows:

There are three modes to be purſued in order to have a bill taken *pro confeſſo*.

Firſt, Under the act of the 5th *Geo.* 2. to render proceſs effectual, where a defendant being ſerved, will not appear, or abſconds to avoid being ſerved.

Second, Where a defendant is taken on an attachment for not anſwering, to bring him into Court on different writs of *habeas corpus*, &c. and if on being brought up on an *alias pluries habeas corpus*, he perſiſts

Corbyn v. *Birch.*

ſiſts in his contempt, the bill is ordered to be taken *pro confeſſo.*

Third, Where a defendant hath appeared, and is in contempt for want of his anſwer, and cannot be taken, and a ſequeſtration hath iſſued againſt him, and which muſt iſſue, as the ground for taking the bill *pro confeſſo.*

To obtain a ſequeſtration an attachment, an attachment with proclamation, a commiſſion of rebellion, and the ſerjeant at arms muſt have iſſued, (and a ſpace of fifteen days between), unleſs where the party is privileged; in which caſe, a ſequeſtration iſſues in the firſt inſtance. (See Lord *Wenman*'s caſe, 701; and *Anon.* 1 *P. Wms.* 535.

It was ſaid by Mr. *Mitford*, when the motion in the principal caſe was made, that no writ of attachment, or proceſs of contempt could iſſue againſt a party an officer belonging to the court out of which that writ is to iſſue. A clerk in Court conſequently coming within the predicament of a privileged perſon, it is humbly ſubmitted, whether the firſt proceeding ſhould not be a ſequeſtration.

True it is, that the ſuſpending of a clerk in Court uſed to be the mode for a contempt in a clerk in Court; but in *Langſtaffe* v. *Hilton*, 16th *April* 1774, a ſequeſtration *niſi* was ordered againſt the defendant in the firſt inſtance for want of his anſwer, for that no attachment lay againſt him, being a privileged perſon.

Should a ſuſpenſion be the only remedy, the relief, it is humbly ſubmitted, will not be compleat; for there are ſeveral clerks in Court who have ſeats without any buſineſs; who hold their ſeats merely to

prevent their ſerving pariſh, and other offices. To ſuſpend ſuch a clerk in Court, may be diſgraceful to him, but no ſatisfaction to a plaintiff; and though he may have a ſeat without buſineſs, he may have property to ſequeſter.

Suppoſe on a decree *ad computandum* againſt a defendant, a clerk in Court, a balance ſhould be found due from him, and he ſhould not pay it, will it be ſaid that a ſequeſtration, (which in equity is in the nature of an execution, and is, as Lord *Hardwicke* ſaid in *Kinſey* v. *Yardley*, 24th *May* 1754 (*a*); *ad ſatisfaciendum;*) cannot iſſue? If it will not, how is the plaintiff to be ſatisfied? The defendant cannot be attached; and his ſuſpenſion may be from bare boards; and even ſhould there be buſineſs pertaining to the ſeat, it would be puniſhing an innocent client, or might be the means of diverting the buſineſs to the ſeat of another clerk in Court, between whom and the contemnor there might be an underſtanding. But if a ſequeſtration may iſſue for a duty, why not in meſne proceſs, to obtain a decree for ſuch duty? A ſequeſtration being the only mode (when a privileged perſon hath appeared and will not anſwer) that can, and by the courſe of the court *muſt be purſued*, to procure a bill to be taken *pro confeſſo*.

(*a*) Supr. 623.

Suppoſe an order ſhould be made to ſuſpend a clerk in Court for a contempt in not anſwering, and he ſhould perſiſt in his contempt, it is ſubmitted whether ſuch an order would have the effect of a ſequeſtration, to ground the taking a bill *pro confeſſo?* I do not know, nor ever heard of, nor do I believe ſuch an inſtance can be produced.

Upon

Cockyn v. Burch.

Upon ſpeaking to ſeveral clerks in Court upon this matter, they ſay, if a clerk in Court is prejudged, by the order for ſuſpending him being made abſolute, he may then be attached, and the line of proceſs purſued to a ſequeſtration, unleſs he be taken up and brought into Court upon any of the preceding proceſſes: but it being a town cauſe, the defendant, according to the indulgence that is uſually granted, may by praying time, have one month, three weeks, and a fortnight, to anſwer, before the plaintiff can have an order *niſi* to ſuſpend him; and it will be ſome time before it is made abſolute. After which, being, as before ſaid, prejudged, it will require the ſame time to go through the line of proceſs againſt him as againſt another party not an officer of the Court; ſo that by belonging to the Court, and by not doing what he knows he ſhould do, inſtead of leſs, he hath more indulgence than a party not an officer. His Lordſhip told the Bar, what was ſubmitted to him was convincing, and therefore ordered a ſequeſtration *niſi*.

I think there is a diſtinction to be taken where an officer of the Court is a plaintiff, and where he is a defendant; becauſe, by ſuing he waves his privilege, and the defendant may purſue ſuch courſe, as is uſual where a plaintiff is not privileged, as it uſed to be before the privilege of Parliament was taken away by an act of the legiſlature; for if a member of Parliament filed his bill, he put himſelf upon the footing of every common ſuitor, (barring the attaching of his perſon); but where he is brought into Court, by being a defendant, he hath a right and may with propriety inſiſt on his privilege. J. D.

Bray v. *Hooker.*

7 July 1784. Lord Thurlow C.

Application to empower ſequeſtrators in meſne proceſs, to grant leaſes, refuſed.

ON the 30th of *June* 1784, the defendant being in contempt to a ſequeſtration, in meſne proceſs, the plaintiff moved that the ſequeſtrators might be at liberty to grant leaſes, and that the defendant's clerk in

in Court might attend with the record of the bill, in order to have it taken *pro confeſſo:* the novelty having ſtruck his Lordſhip, he deſired Mr. *Selwyn* to mention it on a future day; and, accordingly, on the above 7th *July* Mr. *Selwyn* again brought it on; and the Attorney General v. the Mayor of *Coventry* was cited. His Lordſhip ſaid, how could it be? It was in meſne proceſs; the defendant was not before the Court; there had been no decree; conſequently it was not *ad ſatisfaciendum*; and therefore denied ſo much of the motion as prayed the ſequeſtrators might have liberty to grant leaſes; but ſuppoſe it had not been in meſne proceſs, it would be giving ſequeſtrators more power than is given to a receiver who gives ſecurity.

Bray v. *Hooker.*

Sawyer v. *Bowyer.*

30 July 1784. Lord Thurlow C. 1 Bro. C. C. 388. S. C.

ON the firſt Seal after *Trinity* Term 1784, Mr. *Price*, on behalf of the plaintiff, moved to ſuppreſs depoſitions of a witneſs taken before a Maſter, after a decree, (who had been examined in chief before the hearing), without an order for the purpoſe. Mr. *Mitford*, of counſel for the defendant, ſaid it was of courſe, and cited ſome caſes from the *Practical Regiſter.*

But mentioning the caſe of *Browning* v. *Barton*, reported ſupr. 508; it ſtood over for conſideration; and on my laying the ſaid caſe before his Lordſhip, he ſaid it was deciſive, and that he was ſatisfied: but the defendant conſenting to pay 5*l.* for the plaintiff's coſts of the application, it was on this day

30 July 1784.

Sawyer v. *Bowyer.*

day by conſent ordered, that the depoſitions ſhould ſtand upon the defendant's paying unto the plaintiff 5 *l.* for coſts.

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2 Auguſt 1784. Lord Thurlow C. 1 Bro. C.C. 398. S. C.

Woodbridge v. *Hilton.*

Exception will lie to an award of a referee under a decree, if only *ad computandum*; but not if to all matters in difference.

UPON hearing this cauſe, it was by conſent referred to perſons therein named, to arbitrate and put a final end to all matters in difference; and the conſideration of coſts and of all further directions, was reſerved until after the award: the award was made, and the defendant took an exception to it. Upon the exception coming on to be argued the above day, by Mr. *Selwyn* and Mr. *Holliſt* for the defendant, and Mr. *Mansfield* for the plaintiff, a queſtion aroſe reſpecting the propriety of an exception to an award, by arbitration, under a decree. The following caſes were cited: *Hyde* v. *Cooth*, 2 *Vern.* 109; *Creſſy* v. *Carrington*, *ibid*, 79; *Lingood* v. *Eade*, 3 *Atk.* 501.

Lord Chancellor.—If a matter is referred to arbitrators by a decree or order, merely *ad computandum*, I am clear an exception will lie to the award, as to a Maſter's report; the referee being ſubſtituted in the place of a Maſter: but if the reference, as in this caſe, is of all matters in difference, I am clear an exception will not lie; therefore let the exception be overruled.

Moore

Moore v. *Aylet*.

4 Auguſt 1784. Lord Thurlow C.

The competency of this Court, in examining vivâ voce, allowed at law to ground a proſecution for perjury.

THIS cauſe came on to be heard this day for further directions and coſts. The defendant *Aylet* (who was a ſolicitor) attended in perſon. At the riſing of the Court, Mr. *Griffith Price*, on behalf of the ſaid *Aylet*, complained to the Lord Chancellor, that the ſaid *Aylet*, on his way from Court, after the cauſe was heard, to his own houſe, had been arreſted; and the officer who arreſted *Aylet* averring that *Aylet* had been at his own houſe, that he afterwards went from his own houſe to a neighbour's, and that, on his way back to his own houſe he had arreſted the ſaid *Aylet*; The Lord Chancellor directed the parties to go before one of the Maſters of the Court, and make affidavit of the facts; but his Lordſhip being told the Maſters had left the office, his Lordſhip directed me to adminiſter an oath to the ſaid *Aylet*, which I did, "to anſwer truly to ſuch queſtions as ſhould be put to him, and to ſpeak the truth and nothing but the truth." *Aylet* having taken the above oath, the Lord Chancellor aſked *Aylet* if he had been arreſted before he had entered his houſe, after his return from attending the above cauſe; or whether it was after he had been at home, and upon his going out again, that he was arreſted.

Aylet anſwered, that he had not been at home after attending the above cauſe, but that he was arreſted upon the ſteps at his own door, on his way home from attending the Court in the above cauſe, and before he had been within the door of his houſe. Upon *Aylet*'s ſwearing as above, the Lord Chancellor or-

Moore v. *Aylet.*

dered him to be diſcharged from his ſaid arreſt; and he was diſcharged in Court.

A bill having been found againſt *Aylet* for wilful and corrupt perjury on his above examination, upon trial, the 19th of *July* 1785, before Judge *Buller*, ſitting for Lord *Manſfield*, in *Weſtminſter Hall*, *Aylet* having removed the bill of indictment by *certiorari* into his Majeſty's Court of King's Bench, Mr. *Erſkine*, of counſel for the priſoner, doubted the competency of the Lord Chancellor as to examining *vivâ voce*, ſo as to ground a criminal proſecution for perjury. It ſtruck me as very ſtrange, that an affidavit ſworn before one of the Maſters of the Court, (whom the Chancellor appoints,) ſhould be (as was allowed) competent, and an examination before the Chancellor, who delegates the power to a Maſter to adminiſter an oath, ſhould not be competent; however, ſo it was queſtioned. Mr. *Erſkine* aſked me, if it were uſual for the Court to examine a witneſs *vivâ voce?* My anſwer was, that it was done every day, and, to my knowledge, had been the practice almoſt every day for fifty years; that the complaint of *Aylet* was in a cauſe in the Court of Chancery; that *Aylet* took the oath voluntarily; that he had the benefit he ſought by his ſwearing; and that his now diſputing the competency of the Court to adminiſter an oath was with a very ill grace. That objection was over-ruled, and he was found guilty. In *Michaelmas* Term following he moved in arreſt of judgment; and, as one reaſon, again queſtioned the competency of the Lord Chancellor to examine *vivâ voce*, to ground a criminal proſecution.

(*a*) 26 November, 1785.

On this day (*a*) the matter was argued. Mr. Juſtice

tice *Aſhhurſt* wrote to me to deſire I would inform him what I took to be the practice. My anſwer was, that I ever underſtood it to be the practice of the Court to examine *vivâ voce*, upon a complaint of the kind alluded to, and for this reaſon; if the party was wrongfully arreſted, he might be releaſed immediately, and not remain in cuſtody till a formal complaint could be made, founded on affidavit; and mentioned an inſtance of Mr. *Galliard*, a barriſter, being arreſted in going from *Lincoln's Inn* to his Chambers, from attending a cauſe in which he was concerned, and was brought back into Court and diſcharged. The Court over-ruled the objection, and allowed the competency. *Moore* v. *Aylet.*

The defendant afterwards brought a writ of error in Parliament, which was argued in the Houſe of Lords, in *July* 1786, and the judgment was affirmed.

Morgan v. *Morgan* and *Jones*.

4 Auguſt, 1784. Lord Thurlow C.

Intereſt directed to be computed on the arrears of an annuity, from the time of filing the bill; till which time the non-payment was attributed to the neglect of the annuitant in not uſing means to enforce payment, the fund being effective.

ON the marriage of Sir *William Morgan* with the late defendant Lady *Rachael*, in 1725, a ſettlement was made, and a term thereby created on certain lands, for the purpoſe of paying Lady *Rachael* in caſe ſhe ſurvived her huſband (which ſhe did), a yearly ſum or rent charge of 2000 *l.*, with power of entry and diſtreſs, in caſe of non-payment within forty days after it became due. In 1776, ejectments having been been bought to recover a very large ſum alleged to be due for arrears of very long ſtanding, the plaintiff, in 1776, filed his bill for an injunction to

Morgan v. *Morgan* and *Jones.*

ſtay proceeding on the ſaid ejectment, praying that an account might be taken of what, if any thing, was due; offering to pay what ſhould be found due on the account: and by decree, dated 12th *February* 1776, an injunction was granted till further order, and an account directed of what was due for arrears of the ſaid annuity or rent charge, and intereſt, coſts, and further directions were reſerved. The Maſter reported 16,000 *l.* to be due for arrears.

(a) 4 Aug. 1784.

And the cauſe came on to be heard this day (*a*) for further directions as to intereſt and coſts; and it was argued for the defendant, that the annuity was granted for the ſupport of the wife; that the not paying of it was putting the annuitant under the neceſſity of borrowing money at intereſt for her ſupport.

On the part of the plaintiff it was argued, that the debt was ſuch as in it's nature did not carry intereſt: that there being a ſum in arrear muſt be attributed entirely to the neglect of the defendant; for that the fund was a producing fund, and the defendant had a power of entry and diſtreſs under the ſettlement, if the rent charge were not paid as it became due.

(*a*) ſupr. 178.

(*b*) ſupr. 278.

The caſes of *Bedford* v. *Coke* (*a*), 7th *December* 1752; *Bignal* v. *Brereton* (*b*), 2d *July* 1751.

The Lord Chancellor took this diſtinction: that the fund was effective; that the defendant had a power to compel payment of the annuity, but had not exerciſed it; that when the defendant would have uſed that power, ſhe was prevented by the bill and the injunction, and therefore he thought, that from the time of filing the bill, the defendant was entitled to intereſt for the arrears of the rent charge,

and ordered the Maſter to compute intereſt on the arrears from the time of filing the bill, at 4 *per cent.*, and the plaintiff to pay what ſhould be found for ſuch arrears and intereſt, and thereupon, the injunction to be perpetual.

Morgan v. *Morgan* and *Jones*.

Nichols v. *Kearſly*.

16 Auguſt 1784. Lord ThurlowC.

ORDER in the nature of an injunction to ſtay the defendant from printing Capt. *Cook*'s Voyages; granted on petition, between the Seals, at the Lord Chancellor's houſe. See the like, *Chamberlain* v. *Dummer* (*a*); and *Smith* v. *Clark*; the like, on petition,

Order, in nature of an injunction to ſtay waſte, granted on petition at the Lord Chancellor's houſe.

(*a*) 1 Bro. C. C. 166.

Arnold v. *Arnold*.

9 Nov. 1784. Lord ThurlowC. 1 Bro. C.C. 401. S. C.

CATHERINE *Arnold* was ſeiſed of a real eſtate which ſhe deviſed by her will to particular perſons, to ſell and pay legacies out of the money, and further gave legacies, and the reſidue to the plaintiff and others. After making the will, the teſtatrix ſold the real eſtate ſhe had ſo deviſed by her will. The queſtion in the cauſe was between the deviſees of the real eſtate, and the reſiduary legatees of the perſonal eſtate, each claiming the money that had been produced by the ſale of the real eſtate, the reſiduary legatees inſiſting that the ſale of the eſtate by the teſtatrix was a revocation of the will *quoad*; and

Real eſtate deviſed to truſtees to ſell, and to pay the purchaſe money to particular perſons, naming them. The teſtatrix afterwards ſold the eſtate, held to be an ademption of the ſpecific deviſes.

Arnold v. Arnold.

that the money produced by the ſale fell into the reſidue of the perſonal eſtate.

The following caſes were cited: *Vernon* v. *Jones*, 2 *Vern.* 241; *Prec. in Chan.* 32; *Saville* v. *Blacket*, 1 *P. Wms.* 777; *Ogle* v. *Cook*, 3 *Atk.* 746; *Sparrow* v. *Hardcaſtle*, 3 *Atk.* 798.

The Lord Chancellor delivered his opinion, that the ademption of a ſpecific deviſe was the ſame both in law and equity; and was clear that the money ariſing from the real eſtate deviſed by the teſtatrix, and afterwards ſold by her, made part of her general perſonal eſtate.

Manſel v. *Bowles.*

17 Nov. 1784. Lord Thurlow C. 1 Bro. C.C. 403. S. C.

THE cauſe was heard on bill and anſwer, and diſmiſſed, as to *Bowles*, with 40*s.* coſts, as being the courſe of the Court; but upon mentioning that Lord *Hardwicke* had altered that courſe by an order of Court for that ſpecial purpoſe, and left it to the diſcretion of the Court, (and which was founded in common juſtice; for a defendant being ſerved with a ſubpœna, was under the neceſſity of taking a copy of a bill, the expence of which alone might, as the pleadings are ſo much lengthened, to what they were when that rule firſt took place, coſt him ſeven or eight pounds): the next day I produced the order, and the Lord Chancellor diſmiſſed the bill, as to *Bowles*, with coſts to be taxed.

Bill diſmiſſed with full coſts, though the plaintiff had not replied, under an order of Court, by Lord Hardwicke, for that purpoſe.

Worſal

Worſal v. *Marlar.*

16 Dec. 1784. Lord Thurlow C.

A feme covert, entitled to a contingent legacy: the huſband becomes bankrupt; the Court will not order payment, before the aſſignees and the bankrupt have each laid propoſals for a ſettlement before the Maſter.

THE wife was entitled to a contingent legacy; the huſband became bankrupt; his aſſignees claimed the legacy, inſiſting that every contingent intereſt in the bankrupt at the time of the bankruptcy, veſted in his aſſignees. The following caſes and act of parliament were cited: *Jewſon* v. *Moulſon*, 2 *Atk.* 417; Stat. 18 *Geo.* 3. chap. 52; *Jacobſon* v. *Williams*, *Mich.* 1713, 1 *P. Wms.* 382; *Bates* v. *Dandy*, 2 *Atk.* 207; *Miles* v. *Williams*, 1 *P. Wms.* 249; *Tudor* v. *Samyne*, 2 *Vern.* 270. And a diſtinction was taken, where the huſband aſſigned a choſe in action for a valuable conſideration; and where the aſſignment was voluntary, or by the operation of law: that in the preſent caſe the aſſignees were to be conſidered as ſtanding in the place of the huſband; that as the legacy could not be paid without the aid of the Court, the Court would take care of the intereſt of the wife, in the ſame manner as if the huſband had not been bankrupt.

His Lordſhip ordered both the aſſignees, and the huſband to lay propoſals before the Maſter, for a ſettlement on the wife, and the iſſue of the marriage.

Hicks v. *Raincock*,

23 July 1783. Lord Thurlow C.

Bill for an injunction to ſtay the infringement of a patent right. Demurrer, that the plaintiff had not eſtabliſhed his right at law, —overruled.

DEMURRER to a bill for an injunction to ſtay the infringement of a patent for making loops in ſtockings; for that the plaintiff had not eſtabliſhed his right at law. Caſes cited: *Chetwynd* v. *Lyndon*, 2 *Vez.*;

Hicks v. *Raincock.*

Vez. 450; *Salkeld* v. *Science*, 2 *Vez.* 107; Lord *Teynham* v. *Herbert*, 2 *Atk.* 483; *Whitchurch* v. *Hyde*, 2 *Atk.* 391.

Lord Chancellor.—Overrule the demurrer.

26 Jan. 1785. Lord Thurlow C.

Giving notice of the execution of a commiſſion to examine witneſſes, to the plaintiff, in an interpleading bill, and not to the defendant: held to be good.

Duncannon v. *Campbell.*

ON an interpleading bill, the defendant having anſwered, the plaintiff replied, and ſerved a ſubpœna to rejoin. One of the defendants ſued out a commiſſion to examine his witneſſes, and executed it; he gave notice of the execution of the commiſſion to the plaintiff, but gave no notice of it to the other defendant.

Mr. *Scott*, on behalf of the other defendant, moved to diſcharge the order and the commiſſion for irregularity; for that his client ought to have had notice of the execution of it; but his Lordſhip was of opinion the giving of notice to the plaintiff was ſufficient.

But it is ſubmitted, that as the plaintiff in an interpleading bill, hath nothing more to do than to bring the cauſe into a ſtate to be heard; and having replied, and ſerved a ſubpœna to rejoin, ſo that the defendants were enabled to proceed to examine witneſſes, if they thought fit, with which he had nothing to do; the defendant ought to have had notice. J. D.

28 Feb. 1785. Lord Thurlow C.

Pearſon v. *Ward.*

MATTERS of importance on the cauſe, lying within the knowledge of one perſon only, application was made to examine him *de bene eſſe*, though he were neither old nor infirm; and, to ſupport it,

Shirly

Shirly v. Earl *Ferrers*, 3 *P. Wms.* 77, was cited. His Lordſhip granted the motion, ſaying he would have made a precedent, had there not been one. *Pearſon* v. *Ward.*

Hall v. *Smith.*

15 March 1784. Lord Thurlow C. 1 Bro. C.C. 435. S. C.

BY decree the party was to pay coſts; the coſts were taxed; and the party to pay afterwards died; a bill of revivor was filed againſt the repreſentative of the deceaſed party; the defendant put in a plea to it. Upon argument, after citing the caſes of *White* v. *Hayward*, 2 *Vez.* 461; *Kemp* v. *Mackrel*, 2 *Vez.* 579; *Blower* v. *Morret* (*a*); his Lordſhip overruled the plea.

Plea to a bill of revivor, merely for coſts; the coſts having been taxed,—overruled.

(*a*) 3 Atk. 772.

Currer v. *Walkley.*

5 March 1785. Lord Thurlow C.

THE teſtator had deviſed eſtates, ſubject to particular charges: he afterwards entered into a contract for part of the eſtate; and the purchaſer paid the ſum of 600 *l.* as a depoſit.

The bill was for an account of what was due to the plaintiff in reſpect of his charge, and that the purchaſer might pay out of the remainder of his purchaſe what remained due to the plaintiff.

Lord Chancellor.—If an eſtate is deviſed to truſtees to ſell, and the teſtator afterwards contracts for the ſale of the eſtate, it is enough for the purchaſer to pay the purchaſe money into the hands of the truſtees to apply it, as it doth not lie with him to ſee

The contractor for an eſtate deviſed to truſtees to ſell, ſubject to particular charges, muſt ſee the money applied in payment of ſuch charges; but if only to ſell, he hath nothing to do with the application of the money.

Gurrer v. *Walkley.*

ſee it applied; but if the eſtate be deviſed, ſubject to particular charges, it is incumbent on him to ſee it applied in payment of thoſe particular charges.

Whately v. *Smith.*

2 May 1785. On petition to the Maſter of the Rolls.

A co-plaintiff examined to prove a deed, to which he was the only ſurviving witneſs, allowed by conſent.

THE petition ſtated, that it was neceſſary to prove the execution of a certain indenture dated the 14th *March* 1775; that the plaintiff was the only ſurviving witneſs to the deed, &c. and an affidavit verifying the facts was annexed. His Honour, without ordering an attendance, gave liberty to the defendant *Baily* to examine the plaintiff, to prove the execution of the ſaid indenture, ſaving juſt exceptions: But *query*; there had been motions in the ſame cauſe, for the ſame purpoſe, before the Lord Chancellor, which he refuſed; and on the 8th of *April* 1785, Reg. lib. B. fol. 278. the defendant again moved for liberty to examine the plaintiff, when, by conſent of the plaintiff, the motions were granted.

Hicks v. *Hicks.*

In Trinity 1785.

ON a ſimilar application to Sir *Lloyd Kenyon* M. R. to that in the caſe of *Webb* v. *Webb*, ſupr. 298, to Lord *Thurlow* C., that caſe was cited; little attention, however, was paid to it, and the application was refuſed; and this diſtinction was taken, that when deeds are in the hands of a tenant for life, the court

court will not take them out of his hands; but when they are not in his hands, the Court will not order them to be delivered to him. *Hicks* v. *Hicks.*

Hindman v. *Taylor.*

8 June 1785. Lord Thurlow C.

Plea of a fact in bar to a bill of diſcovery, doth not lie, as it would be trying the bar in equity; which is more proper to be tried at law; the caſe re-argued, and the deciſion confirmed.

THE plea in this cauſe was to a bill merely for diſcovery in order to proceed at law, but did not ſtate that any action was brought: the defendant pleaded a fact, as he alleged in bar, which was, that he had paid the money demanded by the plaintiff, and for which the plaintiff had brought his action.

Brownſword v. *Edwards* was cited, 2 *Vezey*, 243. The Lord Chancellor doubted from the firſt if he could try the bar, and at laſt determined the plea was improper. His Lordſhip ſaid, he could not deny but that a plea would lie merely to a bill of diſcovery, but then it muſt be when it leads to a penalty; and in this caſe, allowing the plea would be trying the bar, which is more proper to be tried at law, and if a good bar, the defendant would have the benefit of it at law; and therefore overruled the plea.

Upon re-arguing this plea before the Lord Chancellor, Mr. *Madocks* for the defendant ſaid, it had been queſtioned whether any thing could be pleaded but an equitable plea; but that there are many inſtances where a legal bar may be pleaded: ſettled account pleaded, 1 *Vern.* 180; 2 *Atk.* 1. Plea of an award, 3 *Atk.* 539, 644. Fine and nonclaim, 1 *Ch. Caſ.* 2; a good plea, both to relief and diſcovery.

The Lord Chancellor ſaid, that ſince this plea had firſt come before him, he had converſed with the Maſter

Hindman v. *Taylor.*

Maſter of the Rolls and ſeveral of the Judges reſpecting it, and that he was confirmed in his judgment, that allowing the plea would be trying the bar, which was moſt proper to be tried at law, and therefore affirmed his former order.

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27 June 1785. Lord Thurlow C.

Matthews v. The Biſhop of *Bath* and *Wells.*

Coparceners ſeiſed of an advowſon. Bill for a partition; the mode by preſenting alternately.

THE bill was for the partition of an advowſon; it is neceſſary, becauſe if the party jointly intereſted will not concur in preſenting, and the time lapſes the Biſhop will preſent; the ſtat. of 31ſt of *Henry* the 8th, which compels parties to a partition of a joint tenancy, it was urged, extended to an advowſon, and was to be done by preſenting alternately: ſee a ſimilar caſe before Lord *Hardwicke* (*a*).

(*a*) ſupr.

The Lord Chancellor laid it down as a ſettled principle, where one coparcener hath preſented, the other coparcener may compel the Biſhop the next turn to induct the clerk whom ſuch other coparcener preſents.

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8 July 1785. Sir Lloyd Kenyon M. R. ſitting for the Lord Chancellor. 1 Bro. C.C 469. S. C.

Moodaly v. *Moreton* and *Eaſt India* Company.

Objection that a demurrer would not lie to a bill merely for a diſcovery, to enable the plaintiff to go to law; where the plaintiff had not brought his action at law; but held it would.

THE *Eaſt India* Company had granted to the plaintiff a leaſe for ſupplying *Madras* with tobacco, of which, as the bill ſtated the Company had diſpoſſeſſed him, and granted a leaſe for the ſame purpoſe to another perſon before the expiration of the plaintiff's leaſe: The plaintiff, in order to enable him to ſue for his right, filed his bill for a diſcovery, and a commiſſion to examine witneſſes; but prayed no relief.

The

Moodaly v. *Moreton* et al.

The defendant demurred, upon ſeveral grounds, that the defendants, the *Eaſt India* Company, were Sovereigns of the territory; that they could not be ſued; that it might be attended with bad conſequences, in a political view, to diſcover their ſecrets; and that the defendant *(Moodaly)* being their ſecretary, and ſworn to keep the ſecrets of the Company, could not be compelled to diſcloſe them; beſides, the plaintiff had not brought an action, and no good cauſe of action was proved.

The caſes cited by the defendant were: *Meal* v. *Eaſt India* Company, 3 *P. Wms.* 310; *Heathcote* v. *Fleet*, 2 *Vern.* 422; *Morſe* v. *Buckworth*, 2 *Vern.* 443; and Colonel *Dethick* v. Lord *Howe*, before Lord *Thurlow*. The bill was for a diſcovery; a demurrer allowed, becauſe a good cauſe of action was not ſtated in the bill.

Mr. *Madocks*, for the plaintiff, cited the preceding of *Hindman* v. *Taylor* (*a*).

(*a*) ſupr. 651.

There may be three perſons againſt whom the action may be brought: the Company, the ſecretary, and the leſſee; and how is it to be known againſt whom the action may be brought, till the diſcovery is made.

The Maſter of the Rolls.—I ſhall put the *Eaſt India* Company and the defendant *Moodaly* upon the ſame footing. In ordinary caſes, it is uſual for this Court to grant diſcovery, auxiliary to a Court of law, and to grant commiſſions to examine witneſſes.

It hath been ſaid, that the *Eaſt India* Company have a ſovereign power: Be it ſo; but they may contract in a civil capacity: It cannot be denied but that in a civil capacity they may be ſued: in the caſe now before the Court, they entered into a private contract; if they break their contract, they are liable

to

Moodaly v. *Morefon* et al.

to anſwer for it. In the preſent caſe there is a *primâ facie* ground of action: it hath been ſaid, that no action having been brought, the bill is improper: at firſt I had my doubts, but I have had ſome inſtances handed up to me.

(*a*) ſupr. 65.

I mean the caſes of *Mendes* v. *Barnard* (*a*), 23d *May* 1735; and *Emmot* v. *Aylet*, 12th *February* 1755; which have brought others to my mind; therefore overrule the demurrer.

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21 July 1785. Lord Thurlow C.

Cater v. *Dewar.*

The bill retained for 12 months, with liberty for the plaintiff to bring an action, and to proceed to trial; and, in default, the bill to be diſmiſſed with coſts. The plaintiff did not proceed according to the liberty given to him; and thereupon, the defendant moved to diſmiſs the bill; held to be improper, not being ſuch a judgment as could be pleaded; and the cauſe ordered to be ſet down for further directions.

UPON the hearing of this cauſe, the bill was retained for twelve months, with liberty for the plaintiff to bring his action, and proceed to trial in the mean time; if not, the bill was to be diſmiſſed. The plaintiff having neglected to bring his action within the time, the defendant moved on the Court-day, *July* 1785, that the plaintiff's bill might be diſmiſſed, which was ordered. I thought it not right. I deſired Mr. *Leake* to ſuſpend the order, which he did, and it was mentioned after the fourth Seal; when two doubts aroſe. Firſt, whether ſuch an application was neceſſary? Secondly, if neceſſary, whether that was the proper mode? But Mr. *Bitſon*, one of the ſworn clerks, as an *amicus curiæ*, telling his Lordſhip it was the conſtant practice, upon the plaintiff's neglecting to bring an action within the time, to go before the Maſter without a further order, and to get the coſts taxed, his Lordſhip granted the motion; but bid him tell me, it was his pleaſure I ſhould inform him what

what I took to be the practice, and to ſuſpend the order in the mean time.

In obedience to his Lordſhip's order, I ſubmitted to him the following obſervations:

Firſt, I begged leave to call his attention to the language of the order, made on hearing the cauſe: 'Let the plaintiff's bill be retained for twelve months; and in the mean time let the plaintiff be at liberty to bring an action at law, and proceed to trial; and in caſe he ſhall bring ſuch action and proceed to trial within the time aforeſaid, reſerve further directions; if he doth not, the plaintiff's bill is to be diſmiſſed; (not an abſolute order that it do ſtand diſmiſſed): and in either caſe, (that is, of the plaintiff's bringing or not bringing an action within the time), any of the parties are to be at liberty to apply to the Court;' ſo that from the words of the order it is plain a further application is neceſſary, and was intended by the Court. And indeed I have always underſtood it to be an eſtabliſhed rule, if terms or conditions are annexed to an order; unleſs the words "without further motion," ſuch orders are not concluſive: but the party applying muſt ſwear to the Court that the order hath not been obſerved, and obtain another order to make it abſolute. There are repeated inſtances on the Seals and motion days, when upon an application to diſmiſs a bill for want of proſecution, terms are impoſed on the plaintiff, and if he doth not comply with them, the bill is ordered to be diſmiſſed. If through any miſtake or inadvertence the words "without farther motion" are omitted, the defendant applies and obtains an abſolute order of diſmiſſion.

Should

Cater v. Dewar.

Should your Lordſhip think a further order neceſſary for diſmiſſing a plaintiff's bill, in caſe he doth not bring his action, and proceed to trial within the time limited, the queſtion recurs as to the mode of applying for it.

Your Lordſhip will be pleaſed to obſerve, that the cauſe is ſet down for the deciſion of the Court by a ſolemn judgment upon the caſe; and being brought on to hearing, and an order made, it is ſubmitted whether the Court can afterwards diſpoſe of the bill, on the application of a defendant, but in the ſame ſolemn way? A plaintiff, Lord *Hardwicke* held, in *Carrington* v. *Holley*, 12th *July* 1755 (*a*), might at any time, upon payment of coſts, if there had not been a determination, which an iſſue was not. Suppoſe the plaintiff had brought his action and proceeded to trial, and there had been a verdict againſt him; in that caſe, the cauſe muſt have been ſet down to be heard on the equity reſerved, in order to have the bill diſmiſſed. A judgment may be pleaded, which, it is ſubmitted, a diſmiſſion, by an interlocutory order, cannot. As to the expence of an application for a diſmiſſion, whether by motion, or by a ſolemn hearing, the only difference would be about thirty or forty ſhillings, for ſetting the cauſe down; the ſame briefs that would be wanted for the hearing would be requiſite upon the motion; which difference in expence would be fully compenſated by the difference in point of advantage it would be of to the defendant to have a ſolemn judgment, which he might plead, inſtead of an interlocutory diſmiſſion; by which, though he gets rid of the preſent bill, the plaintiff

(*a*) ſupr. 280.

plaintiff will not be debarred from haraſſing him with another, as he cannot plead. *Cater* v. *Dewar.*

Lord Chancellor, when he came into the Court this day (*a*), addreſſed the Bar; ſtated what I had ſubmitted to him; and put this queſtion: Can a diſmiſſion by an interlocutory order be pleaded? And all agreeing it could not, his Lordſhip ſaid I was perfectly right; and directed me to tell Mr. *Wright* the Regiſter, not to draw up the order; and ſaid the cauſe muſt be ſet down, to get the bill diſmiſſed.

(*a*) 21 July 1785.

Gunn v. *Prior.*

16 Dec. 1785. Lord Thurlow C.

Negative plea: the plaintiff ſtating himſelf to be heir at law, for a diſcovery of title deeds, &c. that the plaintiff was not heir at law, —overruled.

THE bill was for a diſcovery and production of title deeds; and the plaintiff, by the bill, ſtated himſelf to be heir at law. The defendant pleaded to the bill: the plea was, that the plaintiff was not the heir at law. It was ſaid, that it was analogous to a plea; that one who ſets himſelf up for an adminiſtrator, is not adminiſtrator, and the *Practical Regiſter* was cited page 276; *Wynne* v. *Fletcher*, 1 *Vern.* 447; *Ord* v. *Huddleſton*, in 1773. Plea, that the perſon whom the plaintiff pretended to repreſent was living; the plaintiff replied to the plea, and entered into proof in ſupport of his right, not of his limited right, but of his general right: ſo in this caſe, it was ſaid, the plaintiff ought firſt to prove his right to come into this Court, before he hath the diſcovery prayed; for otherwiſe, any perſon might, by ſtating he was heir at law, or repreſentative (without being ſo), come into this Court, and make a perſon diſcover his title, of which another might avail himſelf.

Gunn v. *Prior.*

Lord Chancellor.—Heir or not heir, is a point in iſſue in the cauſe; which the Court will not determine upon a plea; if diſproved, having no title, his bill will be diſmiſſed, and he will pay the coſts: and therefore overrule the plea.

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10 Dec. 1785. Lord Thurlow C.

Johnſon v. *Aylet.*

A party being in Newgate, under a criminal ſentence, cannot be brought up under a writ in meſne proceſs, for the purpoſe of charging him; the leaving of ſuch writ with the Sheriff ſufficiently charging him.

THE defendant *Aylet* being in execution in Newgate, under a ſentence for perjury, Mr. *Richards* as counſel for the plaintiff, on the fourth Seal day after laſt Term, moved for a *habeas corpus* to bring the defendant into Court, merely to charge him in cuſtody with a contempt on meſne proceſs for not anſwering, which, his Lordſhip, on the following day, was pleaſed to grant. Finding by the inſtructions left to draw the order from, that the return was founded on the return of the meſſenger, not of the ſheriff, a doubt ſtruck me, whether the ground of the application was good? And, if ſo, whether there was any occaſion for ſuch an application? I therefore ſubmitted the following reaſons to his Lordſhip:

An *habeas corpus cum cauſis* iſſuing under the order of the Court of Chancery, is ever immediate to, and founded upon the return of the ſheriff, or of the perſon in whoſe cuſtody the contemnor is, except in ſpecial circumſtances as after mentioned: I have always underſtood that where an attachment in meſne proceſs is executed, and the ſheriff returns a *cepi corpus*; and the party is then in execution, in cuſtody, and charged ſo in cuſtody by others, that the next proceſs is an *habeas*

habeas corpus, &c. to bring him up with his cauſes. *Johnſon* v. *Aylet.*

Where an attachment in meſne proceſs hath iſſued, and the ſheriff returns a *cepi corpus*, "and that he hath the defendant ready," which he doth when the defendant is not otherwiſe charged, and he hath taken the defendant's bail-bond for his appearance; then, and then only, the meſſenger goes.

Should the defendant in the interval between the return of the *cepi* and the going of the meſſenger, be charged in execution at the ſuit of others, the ſheriff will not deliver the defendant to the meſſenger, but return that he hath the defendant ſafe in his cuſtody, (that is, in priſon, which is the return the Sheriff makes, when the defendant is not out on bail-bond), this the meſſenger will return ſpecially; and, on that return, an *habeas corpus cum cauſis* will be granted.

In the caſe before your Lordſhip, the application is founded upon the return of the meſſenger, not of the ſheriff.

It is therefore ſubmitted, that the application for the meſſenger was improper, and that if any order was neceſſary, (it being merely to charge the defendant in cuſtody), it ſhould have been an *habeas corpus cum cauſis*; but it was moved for and granted as a motion of courſe, and drawn up and paſſed by the Regiſter's Clerk as ſuch, without his attending to the return of the meſſenger, which is ſpecial. "The "defendant is in his Majeſty's Gaol of Newgate, in "execution, on a criminal proſecution for perjury:" ſpeaking as of his own knowledge, not as having it from the ſheriff; neither doth he ſuggeſt that he had applied for, or that the ſheriff had refuſed to

Johnſon v. Aylet.

deliver the defendant to him: it may be taken to be ſo by implication; but it is ſubmitted, that when this Court iſſues its warrant, it is upon ſomething expreſſed, not merely implied.

Should your Lordſhipbe of opinion the application is well founded, it is ſubmitted, whether there is a neceſſity for it.

The motive for the application is not to bring the defendant up, and turn him over to the Fleet, in order to take the bill *pro confeſſo*, which would not anſwer the purpoſe of the plaintiff, (what the plaintiff ſeeks being a diſcovery), but merely to charge him in cuſtody, that when the term of his ſentence is expired, he may not be releaſed till he hath made the diſcovery, upon an idea, that when that ſentence is at an end, the ſheriff will diſcharge him, without regard to the attachment directed to him to execute; which, whether he may do, it may not be improper to attend to the form of an attachment:

"We command you to attach *A.* ſo as to have "him before us, in our Court of Chancery, as well "touching a contempt, which he, as it is alleged, "hath committed againſt us, as alſo ſuch other mat-"ters as ſhall then and there be laid to his charge; "and further to abide, &c.: and hereof fail not."

The ſheriff, in the caſe before the Court, hath returned, that he hath executed the attachment; and that he hath the defendant in ſafe cuſtody, (the language of returns when in priſon); and having made ſuch return, it is ſubmitted, whether he is not obliged to have the body forthcoming, as to his ſaid contempt, whenever called for.

In

In *Kendal* v. *Baron*, before Lord *Hardwicke*, 9 *Feb.* 1743, an attachment having iſſued againſt the defendant, for want of his anſwer, directed to the ſheriff of the Weſt Riding of *Yorkſhire*; the ſheriff returned a *cepi corpus*, and that he had the defendant ſafe in cuſtody; and the defendant being then charged in execution for ſundry debts, an *habeas corpus* iſſued, directed to the ſheriff, to bring the defendant up with his cauſes, with which he was ſerved; but an inſolvent act having paſſed, the ſheriff diſcharged the defendant out of his cuſtody. On the above day, the ſheriff, on motion, was ordered to ſtand committed, unleſs he ſhewed cauſe to the contrary: and on the 6th of *March* following, he was ordered to ſtand committed.

Therefore, as by the attachment, "the ſheriff is to "attach the defendant, ſo as to have him before the "Court, as well to anſwer the contempt, (for which "the attachment iſſues), as alſo ſuch other matter "as ſhall then and there be laid to his charge; and "of this he is to fail not:" and as the ſheriff by his return ſtates he hath executed the attachment, and that he hath the defendant in his cuſtody, it is ſubmitted, the ſheriff cannot part with the defendant, as to his ſaid contempt, unleſs he be diſcharged, or taken out of his cuſtody, by an order of this Court: If that be ſo, it is ſubmitted, whether the defendant is not ſufficiently charged? And, if he be, is not the preſent application unneceſſary?

Lord Chancellor, upon the above, was pleaſed to ſay, that had the application been neceſſary, the ground for it was wrong; and had it been right, it was unneceſſary: and therefore directed me not to deliver the order.

27 Jan. 1786. Lord Thurlow C.

Dyer v. Lord *Craven*.

Where a mortgagee presents, if the advowson is in case of a lapse in the mortgagor, he may present.

THE mere advowson being mortgaged, the incumbent died; the mortgagee presented; the plaintiff who claimed to be entitled to the equity of redemption, also presented: by reason of the double presentment, the Bishop refused to induct either. Thereupon, the defendant, Lord *Craven*, brought a *quare impedit*, and the plaintiff filed his bill for an injunction; and on the above day, applied for an injunction to stay the defendant's, Lord *Craven*'s, proceeding on the *quare impedit*.

The mortgage was of long standing, and no interest paid. Lord Chancellor seemed to lay it down as a principle, that a mortgagee, when the estate was absolute in him, might present; and, therefore, till it was seen whether the mortgagor would redeem, he would not grant the motion: and in order thereto, directed an account of what was due on the mortgage, and to pay it by a short day; and an injunction to be granted in the mean time, and on report, liberty to apply.

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27 Jan. 1786. Lord Thurlow C.

Goddard v. *Pritchard*.

Defendant served with a subpœna to appear; but, not appearing, an attachment issued against him for his contempt, and on his absconding, to avoid being attached, he Court ordered him to appear by a certain day, under the act of the 5th Geo. 2. to render process effectual against persons who abscond, &c.

AN attachment had issued against the defendant, (who had been served with a subpœna to appear and answer) for his contempt in not appearing; but not being to be found, Mr. *Richards* on the 25th of *January*, moved under the Act of Parliament, of the 5th of *Geo.* 2. to render process effectual against persons who abscond, &c. which provides a remedy,

where

where a defendant abſconds to avoid being ſerved, or being ſerved, refuſes to appear; that the Court would under the ſaid Act, appoint a day for the defendant to appear. The Lord Chancellor had ſome doubt, and aſked Mr. *Richards*, if he had read the act, and wiſhed him to conſider it, and make his motion on a future day: he did on the 27th of *January*, and cited a caſe from 1 *Brown's Chan. Rep.* fol. 388, when his Lordſhip granted the order: The affidavit on which the application was grounded, was, that the defendant had been ſerved with a ſubpœna; that not appearing, an attachment had iſſued; that diligent ſearch had been made to attach him at his laſt place of abode, and where he formerly lived; that he could not be found, and that there was great reaſon to believe, he abſconded to avoid being ſerved with the proceſs of this Court.

Goddard v. *Pritchard.*

The caſe cited, was *Mawer* v. *Mawer*, it is dated the 30th of *June* 1784, and entered Lib. A. 1783, fol. 545.

Watkins v. *Buſh.*

1 Feb. 1786. LordChancellor.

DEMURRER to a bill praying a diſcovery and relief, for that as it was alleged, the plaintiff had no equity, and that if he were entitled to any relief, it was at law.

Demurrer to a bill praying a diſcovery and relief: allowed.

It was objected to by the plaintiff, for that it was a general demurrer, both to diſcovery and relief; and that though he could not have relief in this Court, he might at law, and the diſcovery prayed, would lead to it.

The demurrer was allowed.

Whitchurch v. *Bevis.*

was a plea of the Statute, and a general averment, that there was nothing in writing between the parties; I think that is a right way of pleading.

The caſe before me, is of a man wanting to diſpoſe of a public houſe, for an annuity of 40 *l.* and ſome money was paid him for his ſtock, &c.: the parties go to an attorney, and give him inſtructions, and he takes minutes as the foundation for drawing a deed; and the buſineſs went on from the day of *February* to the 23d of *March* following: On the 23d *March*, the vendor choſe to be off.

The minutes taken by the attorney were more general than the agreement ſet forth in the bill amounted to, which was more particular in the parol part, than in the general agreement.

If there ever were a caſe on which the Statute of Frauds was intended to attach, it muſt have been this; the plea muſt therefore be allowed, and the exception overruled.

I determine this caſe *merely on the ſpecial grounds* of it, becauſe in proceſs of time, it muſt come to be more maturely conſidered, what ſort of verbal agreement (after a plea of the Statute of Frauds), this Court will carry into execution.

I am at preſent prepared to ſay, that where there is an agreement conſiſting of mutual coincidents (on the various terms ſtated in this bill), and in order to it's being extended at large, it is put into the form of an inſtrument, and that is not avoided by any fraud: either party taking advantage of the *locus penitentiæ*, ſhall not be compelled to carry it into execution, if he inſiſt on the Statute of Frauds.

Goodwyn v. *Spray.*

21 Feb. 1786. Lord Thurlow C.

JOSEPH *Stanley* ſeiſed in fee of real eſtates, died inteſtate, leaving the plaintiff and the defendant, his co-heirs at law, to whom the eſtate deſcended as tenants in common, in undivided moieties: The defendant got into poſſeſſion by virtue of an ejectment, and having cut down ſome timber, and threatening to cut down the reſt, the plaintiff filed his bill for an injunction to ſtay waſte; and accordingly on the 21ſt of *February* 1786, moved by Mr. *Brown* for an injunction, on the uſual affidavit, and his Lordſhip granted the motion, but before the Court roſe, having a doubt whether there could be an injunction to ſtay a tenant in common, from doing what he pleaſed with his own property, directed me to ſuſpend the order: Mr. *Brown* on the 22d again mentioned it, when the Lord Chancellor was clear in opinion, he could not ſtop the defendant, and the only remedy the plaintiff had, was to get a partition, and directed the order not to be drawn up.

Moleſworth v. Lord *Verney.*

23 Feb. 1786. Lord Thurlow C.

THE defendants Lord and Lady *Verney* being in contempt to a ſequeſtration for want of their anſwer, the cauſe was ſet down, and there was an order for the Clerk in Court to attend with the record of the bill, that it might be taken *pro confeſſo* againſt the ſaid defendants: The cauſe came on to be heard the above day, when his Lordſhip diſmiſſed the bill againſt them for want of equity.

Kenyon

13 March 1786.
Lord Thurlow C.

Kenyon v. *Worthington.*

See Douglas v. Clay, ſupr. 393.

THOMAS *Kenyon*, the late huſband of the plaintiff, being indebted to ſundry perſons, made his will, and appointed the plaintiff his executrix, and deviſed his real eſtate in aid of it.

John Caſh a creditor, filed a bill on behalf of himſelf and the other creditors, againſt the plaintiff as ſuch executrix, and againſt the deviſee and the heir at law, to eſtabliſh the will, and to have the defendants paid out of the real and perſonal eſtates, and by the decree in that cauſe, dated the 31ſt of *January* 1786, the will was eſtabliſhed, an account of what due to the plaintiff and the other creditors was directed; and advertiſements were to be publiſhed, for the creditors to come in and prove their debts, and the neceſſary directions were given for payment.

Notwithſtanding this decree, *John Worthington* the defendant in this cauſe and one of the creditors, brought his action at law againſt the plaintiff as executrix of the teſtator, for the recovery of his debt.

The plaintiff in this cauſe the executrix, filed her bill in this Court againſt the defendant, ſtating to the effect aforeſaid, and praying an injunction to ſtay proceedings at law; the defendant having prayed a *dedimus* to take his anſwer, the plaintiff applied for, and obtained the common order for an injunction, till anſwer and further order, with liberty for the defendant to proceed to trial, and enter up judgment, with a ſtay of execution.

On

Kenyon v. *Worthington.*

On the 11th of *March* 1783, the plaintiff moved by Mr. *Stanley*, that the injunction might extend to ſtay the defendant from proceeding to trial; but it being at that time uncertain, whether the application was neceſſary, as it was not clear whether the plaintiff at law had declared, and if he had not, the injunction would have prevented his taking any ſtep at law; if he had, then it only went to ſtay execution: It ſtood over till this morning, when Mr. *Stanley* again brought it on, (the plaintiff at law having declared), and cited *Martin* v. *Martin* (*a*); *Bertie* v. *Bertie*; *Morris* v. Bank of *England*; *Forreſter*'s Reports of Caſes in time of Lord *Talbot*, 217 (*b*); *Douglas* v. *Clay*, 21ſt *February* 1769, ſup. 393, by Lord *Camden*; and *Brook* v. *Reynolds*, 28th *November* 1782, by Lord *Thurlow* (*c*): Mr. *Scott* for the defendant argued, that the decree was only *quod computet*, that the plaintiff might not proſecute it; that it was hard the defendant ſhould be prevented from uſing his legal diligence to obtain a judgment, and that he ought to have his election.

(*a*) 1 Vel. 211.

(*b*) 3 P. Wms. 402. in not.

(*c*) 1 Bro. C. C. 183.

Lord Chancellor.—Having decreed an account of what is due to all creditors, and having decreed an account of aſſets, and adminiſtration of them in payment, will this Court ſuffer it's decree to be rendered nugatory, by altering the courſe of adminiſtration? Certainly not. It will ſurely protect the executor or adminiſtrator in obeying it's decrees; the creditors will have juſtice here; and therefore let the injunction extend to ſtay trial.

13 March 1786. Lord Thurlow C. Laſt Seal continued.

Mogg v. *Mogg*.

A defendant not having or claiming any right, cuts down timber on the eſtate, being a mere treſpaſſer, and having committed an act, for which an action would lie againſt him; the Court would not grant an injunction to ſtay waſte.

THE plaintiff was a truſtee of certain eſtates, and in whom the legal eſtate was veſted: The defendant hath not any right, but perſuaded the tenants to cut down timber

Bill for an injunction to ſtay waſte; and this day the plaintiff moved for an injunction accordingly, upon filing the bill: It was mentioned on the 11th, but the Lord Chancellor deſired Mr. *Madocks* to ſee, if he could find an inſtance, where a ſtranger comes upon lands as a treſpaſſer, and cuts down timber, or commits waſte, in which this Court hath granted an injunction to ſtay him, ſaying he was liable to an action by which he might be ſtayed.

On this day, the 13th, Mr. *Madocks* ſaid he had recollected a caſe before Lord *Camden* C. in which the plaintiff was lord of a manor in *Oxfordſhire*, upon which the defendants claimed a right to eſtovers, and under that right, they cut down timber in one day to the value of 400 *l.*; the plaintiff filed his bill for an injunction to ſtay waſte, and obtained one; upon it's being ſerved, their attorney adviſed the defendants to deſiſt from cutting down any more timber, but adviſed other tenants of the manor to cut down timber; upon which Lord *Camden* granted an injunction to ſtay waſte, againſt perſons not parties, and Mr. *Madocks* argued this as a caſe in point.

The

The Lord Chancellor ſaid it did not apply, for in that caſe there was a right to ſomething in the defendants, though perhaps they carried it beyond what ſuch right went to; and that until ſuch right was determined, it was very proper to ſtay them from doing an act, which if it turned out they had no right to do, would be irreparable: but in the preſent caſe the defendant had no intereſt; he was a mere treſpaſſer, and being ſuch, an action of treſpaſs would lie againſt him; and therefore his Lordſhip would not grant the motion. *Mogg* v. *Mogg.*

Sweet v. *Southcote.*

17 May 1786. Sir Lloyd Kenyon M. R. ſitting for Lord Thurlow C.

BILL againſt a derivative mortgagee, for a diſcovery, ſtating, that he had notice of a ſettlement; the defendant pleaded: Upon arguing the plea this day, his Honour ſaid, if a derivative mortgagee under mortgagees, without notice, pleads ſuch matter, though he hath notice by a ſettlement coming to his hands, that the firſt mortgagor had no right to mortgage, he ſhall not diſcover it; therefore allow the plea.

Derivative mortgagee not affected by a ſettlement's coming to his hands, if the mortgagee from whom he took his mortgage, had not notice.

Bancroft

9 Nov. 1743. Lib. B. 95, 1 Vef. 312. S. C. and 3 Atk. 1. S. C.

Lacon v. *Mertins.*

The admiſſion of a parol agreement, takes it out of the Statute of Frauds.

THE bill was for the ſpecific performance of a parol agreement, by the purchaſer againſt the heir at law of the vendor; he by his anſwer doth not inſiſt on the ſtatute in expreſs words, but he ſays, 'if 'any parol agreement were made, he was not affected 'thereby, in regard the ſame was not reduced into 'writing, nor in any ſort performed by *Elizabeth* 'Hay in her life-time;' and Lord *Hardwicke* C. ſaid, that had the bill been againſt *Elizabeth Hay*, and ſhe had admitted the agreement, he would have decreed a ſpecific performance of it, for the admiſſion took the caſe out of the Statute.

8 Feb. 1786. Lord Thurlow C. 2 Bro. C. C. 559. S. C.

Whitchurch v. *Bevis.*

Plea of Statute of Fraud allowed, but it was upon the particular circumſtances of the caſe.

PLEA of the Statute of Frauds, to a bill for diſcovery, as well as for a ſpecific performance of a parol agreement, and the bill ſtated ſeveral acts, in part performance; but the defendant did not by anſwer, deny the agreement.

The plea was arguing ſeveral days, and his Lordſhip upon the preceding caſe of *Child* v. *Godolphin*, which he read, made a ſimilar order. His Lordſhip cited, Earl of *Aylesford's* caſe, 2 *Strange*, 783, and ſaid, as Earl *Macclesfield* did in *Child* v. *Godolphin*, that if the defendant admitted the agreement, the Court would decree a performance; for the admiſſion took it out of the Statute.

This

Whitchurch v. *Bevis.*

This caſe being reargued 2d *March* 1789, before Lord *Thurlow* C., on giving judgment, he proceeded thus:

This is a ſubject I have much conſidered, and I have alſo conſulted ſeveral of the Judges upon it, but I do not find myſelf enabled to reconcile the practice of the Court, in two of it's rules: the allowance to plead the Statute of Frauds; and a decree of an agreement, as it ſtands confeſſed in the anſwer.

Lord Macclesfield and Lord Hardwicke *ſay* he *ought* to deny it.

The rule ſeems to carry a neceſſary concluſion along with it, that whatever in conſcience affords the plaintiff a title to relief, it is impoſſible to exempt the defendant from a diſcovery of, in order to enable the plaintiff to obtain that relief; but where the defendant hath pleaded the Statute, and hath not confeſſed the agreement, the Court hath in no inſtance compelled him to perform it; the caſe of *Wayley* v. *Bagnal*, hath placed that rule a great deal too ſtrong to be overturned.

I have read over with attention all the caſes, and find but two decided caſes, in which relief hath been given upon an agreement confeſſed, againſt a plea of the Statute of Frauds, the firſt, *Child* v. *Comber*, before Lord *Macclesfield*, the 10th *March* 1723; the other *Fox* v. *Peachy*, before Lord *Hardwicke*, 2 *Atk.* 256; but the dicta are very numerous. It appears to me to be neceſſary to correct that rule; if the plaintiff doth not ſtate his agreement, as not being within the Statute, I think his bill ſhould be demurred to.

In the preſent deciſion, I ſhall go no further than the caſe before me: The caſe in *Ireland*, though not like the preſent, is analogous, conſiſting of a variety of tranſactions, approaching to a performance; there

was

Countess of *Strathmore* v. *Bowes.*

ſtay waſte, or in the nature of waſte, when the waſte ſworn to, and upon which the injunction is grounded, is denied; the Court will admit proof by affidavit, in ſupport of the facts, and the following are the reaſons it is ſubmitted for ſuch permiſſion.

When applications for injunctions to ſtay waſte, or what is in the nature of waſte, (which are ſpecially moved, and upon affidavit), are made, the Court expects ſuch affidavits to be clear and poſitive, as to the acts done, &c. and not to ſpeak from hearſay and belief; and it frequently happens, that the affidavits not being ſatisfactory, the Court refuſes the motion, and tells the plaintiff to get a freſh affidavit, and to ſpeak with more preciſion.

Therefore an order ſo granted, is founded either on truth, or falſehood; and it is not a defendant's denying by his anſwer the acts ſworn to, that make them leſs true: Suppoſe five or ſix perſons were to ſwear poſitively to acts of waſte, &c. and a defendant was by his anſwer to deny the whole or part; it then would reſt with the Court, to conſider to whom the moſt credit is to be given: How is that to be known, but by conſidering the ſwearing of each? And upon a defendant's application to diſſolve an injunction to ſtay waſte; will the Court diſſolve it, without knowing what they diſſolve? And how is that to be known, without reading the injunction, or the order granting it, (which are always read, or ſuppoſed to be read), and if read, the Court cannot but ſee, upon what it is founded, for the injunction recites the order in *hæc verba*, (which runs thus), 'Upon opening of the 'matter by Mr. of counſel with the plain-

'tiff,

'tiff, it was alleged that it appears by the affidavit of '(first as to the plaintiff's title), that the defend-'ant hath done, or caused to be done, &c.' And should the Court dissolve the injunction, without knowing upon what it was founded, merely upon the answer of the defendant, it will do that blindfold, which may be the means of irreparable damage; and if a defendant hath committed the least waste, though not to the extent sworn to, the Court will be cautious to prevent his doing further injury. See the cases of *Packington* v. *Packington* (*a*); and Attorney General v. *Burrow* (*b*).

(*a*) Supr. 101.

(*b*) Supr. 128.

That the answer is attended to, so far only as it goes to the denial of the plaintiffs right, or equity, it may not be improper to refer your Honour to the common and usual language of an order, to dissolve an injunction unless cause; which is the most usual for a defendant to apply for, on putting in his answer, and which if the defendant had done, instead of the mode he hath taken, please to attend to what he would have said: "Whereas the plaintiff hath obtained an injunction, to stay the defendant, his servants, workmen, and agents, from committing, &c. until answer, and further order, now upon motion this day made by Mr. *A.* of counsel with the defendant, it was alleged, that the defendant hath since put in a full and perfect answer to the plaintiff's bill, and thereby denied the *whole equity thereof*, (that is, the plaintiff's right to come into this Court, not the *acts sworn to have been committed*); and *therefore* it was prayed, that the said injunction may be dissolved, which is ordered accordingly, unless cause."

Counteſs of *Strathmore* v. *Bowes.*

That the admitting of affidavits to be read in ſupport of injunctions to ſtay waſte upon application, is not novel, will appear from the following caſes, and the dictum of Lord *Hardwicke*:

Mount v. *Fenner*, 4th of *Auguſt* 1732. The bill was for an injunction, to ſtay the printing of the Common Prayer Book; and an injunction was granted upon affidavit of the title, till anſwer and further order; the defendant put in his anſwer, and upon his application to diſſolve the injunction, which was moved ſpecially, *affidavits were going to be read*, but it being ſuggeſted, that the defendant had put in a plea, which went to the plaintiff's title, the Court ſaved the notice, until the plea was argued; the plea was argued the above day, and allowed; and in conſequence thereof, there being an end of the plaintiff's equity, the defendant moved immediately to diſſolve the injunction, which was granted.

On the 11th of *July* 1786, Mr. Attorney General again moved to diſſolve the injunction, when his Honour ſaid, that as the deciding of the queſtion would eſtabliſh the practice in future, he would ſave the motion until the Third Seal, and in the mean time, would conſult the Lord Chancellor. The plaintiff inadvertently conſenting that the defendant ſhould read affidavits, in ſupport of his anſwer, (never before heard of), if he would conſent, the plaintiff ſhould read his, with which the defendant immediately cloſed, by conſent, and ſo it is noted, affidavits on each ſide were read, and the defendant's affidavit being the ſtrongeſt, the injunction was diſſolved,

Rayner

Rayner v. *Julian.*

21 June 1786. Sir Lloyd Kenyon M. R. sitting for Lord Chancellor.

DEMURRER to a bill, for that it was multifarious, overruled being informal; his Honour at the same time saying, that he would not have it understood, he overruled it upon a ground, that a demurrer would not lie to a bill for being multifarious, and he put this case: Suppose an estate is sold in lots to different persons, a plaintiff could not include them all in one bill for a specific performance; for each party's case would be distinct, and would depend upon it's own peculiar circumstances; and there must have been a distinct bill upon each contract.

Demurrer will not lie to a bill for being multifarious.

Bolton v. *Lowther.*

15 Nov. 1786.

IT was said by Lord *Thurlow* C., that a lord of a Manor hath no right to a common; he hath a right to the soil, to dig, to plant upon, and to do every thing authorised by the Statute of *Merton.*

Rowley v. *Ridley.*

23 Nov. 1786. Lord Thurlow C.

APPLICATION founded on affidavit, to amend a deposition.

Depositions of a witness amended.

Lord Chancellor.—Let the deposition of *William Ridley* be amended, by striking out the word *November*, in the line of the said deposition, and inserting

Rowley v. *Ridley.*

inſtead thereof, the word *October*; and to that end, let the ſaid depoſitions be taken off the file; and let the ſaid depoſitions when ſo amended, be reſworn by the ſaid *William Ridley*, before the Maſter, to whom the matter in queſtion is referred.

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22 Feb. 1787. Lord Thurlow C.

Selby v. *Selby.*

James Selby Eſquire, by his will in his own writing, deviſed eſtates beneficially in truſt for a Mrs. *Hone*, and deviſed particular eſtates to *his heirs*, and if *none ſhould appear in a given time, he deviſed his eſtate in fee ſimple to William Lowndes*, he taking upon himſelf and uſing *the name of Selby*: Mrs. *Hone* filed a bill to eſtabliſh the will, and to have the truſts thereof carried into execution; and made *Samuel Selby*, who, the bill ſtated, pretended to be heir at law of the teſtator, a defendant.

The ſaid *William Lowndes* alſo filed a bill to eſtabliſh the will, and to have the benefit of the ſeveral deviſes in his favour; and prayed that the defendants, and amongſt others the ſaid *Samuel Selby*, who pretended to be heir at law of the teſtator, might ſet forth their reſpective claims: the ſaid *Samuel Selby* put in his anſwer, and thereby ſet forth his pedigree, and that he was heir at law of the teſtator; and inſiſted on his right.

On the 23d of *April* 1779, both the cauſes were brought on to hearing, and the ſaid *Samuel* having ſtood out all proceſs of contempt to a ſequeſtration in Mrs. *Hone*'s cauſe, for want of his anſwer, the plain-

tiff's bill in that cauſe was decreed to be taken *pro confeſſo* againſt him, and making default in appearance in the ſaid *William Lowndes*'s cauſe, although duly ſerved with a ſubpœna to hear judgment, the bill was retained for twelve months, with liberty for three of the other defendants, excluding *Samuel Selby*, to bring actions, or ejectments as they ſhould be adviſed; and further directions were reſerved; and the decree or order was to be binding on the ſaid defendant *Samuel Selby*, unleſs he ſhewed cauſe to the contrary; which he not doing, the ſame was made abſolute.

The three defendants, to whom liberty was given by the ſaid order to bring ejectments, brought ejectments accordingly, but failed therein; and the cauſes being ſet down to be heard on the equity reſerved came on to be heard the 28th *March* 1783, when the will was decreed to be eſtabliſhed, (having been proved *per teſtes*), and the truſts executed; and an account of the teſtator's debts and legacies, and of his perſonal eſtates, and the uſual application of it, and other neceſſary directions were given.

The Maſter having made his report, the cauſe came on to be heard for further directions, when it appearing that the debts and legacies were paid, and the eſtates which remained unſold were clear, his Lordſhip ordered that the accumulated rents which had been paid into the Bank, by the receiver appointed in the cauſe, to abide the event of the cauſes, to the amount of 20,000 *l.* ſhould be paid to the ſaid plaintiff *William Lowndes*; and the Court declared he was entitled to the eſtates deviſed to him, and ordered that he ſhould be let into poſſeſſion of the ſaid eſtates; which he

Selby v. *Selby.*

was, and the accumulated rents were paid to him, and he in conformity to the will, took upon himself and uſed the name of *Selby*; and the decree was inrolled.

The before named *Samuel Selby*, having afterwards brought an ejectment, to recover the poſſeſſion of the ſaid eſtates, the ſaid *William Lowndes* by his then name of *Selby*, filed his bill againſt the ſaid *Samuel Selby*, ſtating the above facts, and praying a perpetual injunction.

On the 6th of *February* 1787, the cauſe came on to be heard before Lord *Thurlow* C.: It was argued that the Court having eſtabliſhed the will, and directed the truſts to be performed, and the plaintiff *Selby* to be put into poſſeſſion of the eſtates; the defendant by bringing an ejectment, was preventing the execution of theſe truſts, and the decree from having the effect intended.

On the part of the defendant it was argued, the defendant did not mean, and that in fact he did not diſpute the effect of the will, or the execution of the truſts of it; that one of the truſts was a deviſe for his heirs; that he the defendant was that heir; and that the ejectment brought by him, was in order to determine that right. His Lordſhip ſaid he would conſider of it, and ordered the cauſe to ſtand over, until the 9th day of *February* 1787: It ſtood in the paper that day, when his Lordſhip ordered it to ſtand over until the 22d day of *February* 1787, and aſked me, if I knew of any caſe that would apply, and what my thoughts were of the caſe before him: In conſequence of which, I laid before his Lordſhip, the two caſes of *Lowe* v. *Jolliffe*, and Attorney General v. *Montgomery* (*a*), and ſubmitted, that

(*a*) Supr. 74.

as

as the defendant *Selby* ſuffered the bill filed by Mrs. *Hone*, to eſtabliſh the will of the teſtator, and to which he was made a defendant, as claiming to be heir at law, to be taken *pro confeſſo* againſt him for want of his anſwer, (which was in effect confeſſing he had no claim); and as he did not appear at the time the cauſes were heard, to aſſert the claim made by him as heir at law, in his anſwer to the bill, filed by the ſaid *William Lowndes*, though duly ſerved with a ſubpœna for that purpoſe, and afterwards permitted the decree or order by which he was excluded, (three only of the defendants who claimed to be heirs at law, being thereby permitted to bring ejectments, leaving him out), to be made abſolute, although he were ſerved with a ſubpœna to ſhew cauſe againſt the ſaid order; whether the defendant *Samuel Selby*, was not conſidered by the Court, at the time the ſaid order was made, and is not now to be conſidered as having *abandoned* his claim, if he had any? And if ſo, whether the Court will permit him to reſume it, while the decree by which he is excluded, and which is inrolled, remains in force? In 2 *Chan. Reports*, p. 127, it is laid down, 'that the Court will enforce the decree 'of a former Chancellor, until it be duly reverſed;' And in *Sorrel* v. *Carpenter*, 2 *P. Wms.* 482, it is ſaid, 'this Court will oblige all perſons to take notice of 'it's decrees, as of judgments.'

On a bill brought by creditors, on behalf of themſelves and the reſt of the creditors, a decree for an account of what is due to the creditors, and an advertiſement for creditors to come in by a day to be fixed, or to be excluded; and an account of aſſets, and

Selby v. *Selby*.

and application of ſuch aſſets; this Court will not permit a creditor, (though he doth not come in under the decree), *to take any legal method for the recovery of his debt* (*a*), as by that means the decree will be counteracted; and ſhould a creditor apply for leave to go before the Maſter to prove his debt, after the time is run, the Court will expect him to account for his remiſſneſs: And even if he is permitted, it will be upon terms, that it is not to diſturb any dividend that may have been made: If a man ſtands by and ſees another build upon his ground, without forbidding or in any wiſe interrupting him, he will not afterwards be permitted to claim that ground: How far the defendant *Selby*'s abandoning his claim in manner aforeſaid, his letting the decree be executed, which directs the accumulated rents to be paid to the plaintiff, and the plaintiff to be let into poſſeſſion, and the title deeds to be delivered to him, which hath been done, be analogous, is ſubmitted to your Lordſhip.

(*a*) Brooks v. Reynolds, 28 May 1782, and Kenyon v. Worthington, 13 March 1786; ſupr. Moore v. Paſte, 26 June 1783.

The cauſe ſtanding for this day, 22d of *Feb.* 1787, in the paper for directions, his Lordſhip ſaid, from what he had heard, and from what he had read, this Court will not permit any perſon to impede the execution of a decree, ſo long as the decree remains unappealed; and therefore his Lordſhip ordered *a perpetual injunction*.

Pope

Pope v. *Gwyn.*

27 Feb. 1787. Lord Thurlow C.

THE teſtator willed, that his debts ſhould be paid out of his real and perſonal eſtate, and then gave ſeveral legacies, and willed thoſe legacies ſhould be paid out of his real and perſonal eſtate, that was poſſeſſed of, or ſhould be poſſeſſed of, or might thereafter be poſſeſſed of; but did not deviſe his eſtate, or make any executor: He left two infants defendants in the cauſe, his co-heirs at law. The Court held the real eſtates to be equitable aſſets, and decreed them to be ſold; and the infants the co-heirs to convey at twenty-one; and the purchaſers to hold and enjoy in the mean time.

Mountain v. *Bennet.*

1 March 1787. Lord Thurlow C.

A new trial of an iſſue *deviſavit vel non*, the heir at law paying the coſts of the former trial.

MR. *Manſfield* on the Firſt Seal after *Hilary* Term, applied on behalf of the defendant the heir at law, for a new trial of an iſſue *deviſavit vel non*, which was granted, upon payment of the coſts of the former trial. Mr. *Manſfield* objected to his client's paying the coſts, it being unuſual, as he inſiſted, for an heir at law to pay coſts. It ſtood over from the Firſt Seal to this day, for his Lordſhip's conſideration. Having laid before his Lordſhip the caſes of *Birt* v. *Pitt* (*a*); and *Blount* v. *Swinnerton* (*b*), his Lordſhip granted a new trial, upon the defendant's the heir at law, paying the coſt of the former.

(*a*) Supr. 87.
(*b*) Supr. 500.

Gueſt

12 March 1787.
Lord Thurlow C.

Gueſt v. *Harris.*

BILL diſmiſſed on hearing the cauſe, with coſts to be taxed as to the defendant *Cook*; and the plaintiff to pay 100 *l.* coſts to the reſt of the defendants.

9 June 1787.
Lord Thurlow C.

Molineux v. *Luard.*

The replying to an anſwer, the ſerving a ſubpœna to rejoin, and giving rules to produce witneſſes, will not prevent a defendant from moving upon his anſwer, to diſſolve an injunction unleſs cauſe.

THE bill was amongſt other things for an injunction; and an injunction was granted until anſwer, and further order: The defendant anſwered, and having let two Terms paſs without applying to diſſolve it, the plaintiff imagined, he did not intend ſuch application, and therefore replied, ſerved a ſubpœna to rejoin, and then gave a rule to produce witneſſes, and prepared interrogatories: then and not before, the defendant obtained the uſual order, to diſſolve the injunction, unleſs the plaintiff ſhewed cauſe to the contrary: the plaintiff upon the grounds of the preceding ſtatement, having ſerved the defendant with the order, applied this day to diſcharge the order for irregularity.

Lord Chancellor.—Why did not the plaintiff take exceptions? He had eight days of courſe to do it, and upon application, that time would have been enlarged: Are a replication and a ſubpœna, to ſtop a defendant from applying to diſſolve the injunction? If ſo, a plaintiff may reply immediately on the anſwer's coming in, and the next day move for, and ſue out, and ſerve a ſubpœna to rejoin; and thereby preſerve his injunction, which is only a temporary judgment, until

until it is ſeen whether the plaintiff hath any equity, and though continued to the hearing, will then drop, unleſs the plaintiff prove his caſe, and it be made perpetual. *Molineux* v. *Luard.*

Brown v. *Parry.*

13 June 1787. Lord Thurlow C.

A deviſe or bequeſt by the teſtator to his widow, unleſs he ſay it is to be in bar of dower, doth not bar her dower.

THE teſtator died ſeiſed of lands, of which the defendant, his widow, was dowable. By his will, he deviſed to his wife ſome particular eſtates for life; and he alſo bequeathed to her ſpecific parts of his perſonal eſtate, but did not add in bar of dower: the queſtion was, whether by accepting the deviſe and bequeſt under her huſband's will, ſhe had not barred her claim of dower? The Lord Chancellor was clear ſhe had not; for it was not her huſband, but the law, that gave her dower; and what her huſband gave her was an addition.

Kenrick v. *Clayton.*

13 June 1787. Lord Thurlow C.

Defendant cannot demur after having obtained an order to anſwer only.

THE defendant had obtained three orders for time to anſwer *only*; and not anſwering within the time limited, an attachment iſſued againſt him. In *July* 1786, he put in a demurrer only: Upon application to diſcharge the demurrer for irregularity, it was referred to the Maſter, to ſee if it were regular, or not; the Maſter having reported it to be regular, the plaintiff took exceptions to the report; and,

Kenrick v. *Clayton.*

upon arguing the exceptions this day, they were allowed.

Stevenſon v. *Gardner*, 2 *P. Wms.* 286; *Penn* v. Lord *Baltimore*, 12 *Feb.* 1755, were cited.

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26 June 1777. Lord Rathurſt C.

Morſe v. *Stevens.*

IN 1764, the plaintiff filed a bill to perpetuate the teſtimony of witneſſes, and examined them; but proceeded no further; on the death of a witneſs, which happened in 1777, the plaintiff applied in this cauſe, to publiſh the depoſitions. His Lordſhip was of opinion, that by his neglect he had precluded himſelf.

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2 July 1787. Lord Thurlow C.

Baniſter v. *Way.*

BILL by the aſſignee of a ſhare of the reſidue of the teſtator's eſtate, belonging to one of the reſiduary legatees againſt the truſtees and executors, and alſo againſt the reſiduary legatees who were out of the juriſdiction of the Court, (as the bill ſtated, and was admitted to be the fact), to eſtabliſh the teſtator's will, and for an account of the teſtator's perſonal and real eſtate, and to be paid the ſhare of the charges belonging to the reſiduary legatee, which he had purchaſed. The cauſe was heard before Lord *Thurlow*, on the 5th of *February* 1782, when a decree was pronounced eſtabliſhing the will, and directing the neceſſary accounts. Some of the reſiduary legatees, though ſtill abroad,

abroad, applied this day, praying to have the benefit of the decree, ſubmitting to be bound by it: And it was ordered, (they ſubmitting to the decree), that they ſhould be at liberty to enter their appearance by their Clerks in Court; and that they ſhould have the like benefit of the decree, as if they had put in an anſwer, and had appeared at the hearing of the cauſe. *Banifter* v. *Way.*

Creuze v. Biſhop of *London.*

23 July 1787. Lord Thurlow C.

An exception was taken to a report, whereby the Maſter appointed a particular perſon to be the receiver in the cauſe: It was objected, that exceptions did not lie to ſuch report. His Lordſhip ſaid the objection was not founded, for that no act, judgment, or opinion of a Maſter was concluſive; what he had done was an act; it was referred to him to appoint, not to approve, as he doth of a guardian or maintenance, and ſtate his opinion for the Court to judge of; he under the order had appointed; and there was no way to bring it before the Court but by exception; and, being open to exception, ſhould be confirmed in the uſual way.

The proper way to bring a report, appointing a receiver, before the Court, is by exception to it.

There were cited, *Hamilton* v. *Frankland*, in 1752, by Lord *Hardwicke*; and *Sheppard* v. *Mills*, in 1785.

Curzon

25 July 1787. Lord Thurlow C.

Curzon v. *Green.*

BILL by four perſons, for diſtinct demands; two of them died: the queſtion was, whether the ſuit was abated? His Lordſhip held it was.

6 Nov. 1787. Lord Thurlow C.

Collinridge v. *Mount.*

If the ſheriff takes a bail bond on a writ of *ne exeat regno*, the Court hath nothing to do with proſecuting the bond.

A WRIT of *ne exeat regno* ordered to iſſue againſt the defendant, until anſwer and further order, and to be marked in 300*l.* A writ was made out and delivered to the Sheriff, by which he was to take the defendant on bail in 300*l.*; the Sheriff took bail; the defendant appeared, (ſo that he was in Court); and after putting in two inſufficient anſwers, left the kingdom; (an inſufficient anſwer being no anſwer, the plaintiff might have taken the bill *pro confeſſo*, on a ſequeſtration for want of his anſwer, the Sheriff having given up the bail bond to the plaintiff, with liberty to uſe his name, being indemnified): the plaintiff, on the above 6th of *November* 1787, moved, by Mr. *Johnſon*, for leave to put the bail bond on ſuit, which was granted. The application being quite novel, after ſtating the above facts, I ſubmitted to his Lordſhip, whether this Court had any thing to do with the buſineſs, other than to call on the Sheriff to produce the defendant. Lord Chancellor ſaid, he would think of it; and, on Mr. *Johnſon*'s mentioning it again on the 14th of *November*, Lord Chancellor

Chancellor ſaid he had nothing to do with proſecuting the bond, and reſcinded the order he had made. *Colliridge* v. *Mount.*

Fox v. *Mackreth.*

23 Nov. 1787. 2 Bro. C. C. 400. S. C.

IN the courſe of hearing this cauſe, on an appeal, the bill being to ſet aſide a purchaſe made by the defendant of the plaintiff, juſt after he had attained twenty-one, for fraud and impoſition, and undue advantage: It was ſaid, that all the Barons of the Exchequer, on the 21ſt of *June* 1787, were unanimous, that inadequacy of price alone was not ſufficient to ſet aſide an agreement.

Inadequacy of price alone not ſufficient to ſet aſide an agreement.

Parkins v. *Morris.*

5 Dec. 1787. Lord Thurlow C.

MR. *Ainge*, for the plaintiff, having before moved for an order to warrant a ſhort writ of execution; his Lordſhip having doubts as to the propriety of the motion, deſired Mr. *Ainge* to poſtpone it to a future day; and ſaid he would have me ſtate to him what was the practice. In obedience to his commands, I ſubmitted to his Lordſhip:—

Reaſons for granting a partial, or ſhort writ of execution of a decree.

That the mode of proceeding againſt a party in a cauſe for a contempt, is by attachment, except ſuch contempt be groſs miſbehaviour; in which caſe it is by application to commit him. The ground for an attachment which iſſues of courſe, is diſobedience to ſomething under the Great Seal, ſuch as a ſubpœna to appear, and anſwer; or a writ of execution, ſuch

Parkins v. Morris.

writ being neceſſary when a party is driven to enforce a decree: The expence is borne by the party ſuing it out, unleſs the other party ſuffer an attachment to iſſue; in which caſe, it comes within the coſts of his contempt. As it was, and is ſaid to be ſtill the rule, that a judgment cannot be divided, but that a writ of execution muſt be of the whole, unleſs by ſpecial order; it was the habit of the Court fifty years back, Mr. *D.* ſpeaks from his own experience, to grant orders for the purpoſe of warranting a partial or ſhort writ of execution of a decree, which with great ſubmiſſion appears to be reaſonable, for a plaintiff may be driven to compel a particular defendant to obey a particular direction, quite unconnected with a multiplicity of other directions, which concern the other parties. For inſtance: A decree eſtabliſhing a will, and directing the truſts to be executed, with the conſequential accounts; ſale of the real eſtate in aid of the perſonal; guardian, maintenance, and receiver; and then a direction for a particular defendant, who claimed a beneficial intereſt in Stocks or ſecurity, purchaſed or taken in his name by the teſtator to transfer or aſſign them, and to account for and pay the intereſt; the Maſter makes his report, and ſtates the reſult of the accounts and inquiries, and particularly finds that the defendant had received the ſum of : Should the plaintiff be under the neceſſity to enforce the decree againſt ſuch defendant, if according to the rule, he muſt in the writ of execution write the whole of the decree and report, the expence will be conſiderable, and will, ſhould the defendant immediately comply with it, fall on the plaintiff; on the contrary,

contrary, ſhould it be confined to that part which relates ſolely to the ſaid defendant, it will come within a very narrow compaſs. The order to warrant ſuch partial writ will ſtate, that by the decree it was amongſt other things ordered that the defendant ſhould, &c.; that the Maſter had made his report, and thereby, as to the ſaid defendant, found there was due from him the ſum of that the plaintiff had applied to him for payment, which he had refuſed; and therefore it was prayed, &c.: which is ordered accordingly: and the Court may, as it frequently doth, fix a time, which by the decree is indefinite. Mr. *Ainge* moved again the above day: his Lordſhip ſaid he was ſatisfied, and granted the motion.

Sir *James Wright* v. *Nutt* and *Pinbury*.

23 Jan. 1788. Lord Thurlow C.

THE plaintiff was governor of *Georgia* in *America*, in the time of the rebellion; he was baniſhed, proſcribed, and his eſtate confiſcated; and being indebted, the creditor, who is abroad, appoints an attorney here to ſue: The attorney brings an action againſt both: The debtor files a bill againſt both principal, and attorney. Upon the anſwer of the attorney, the principal being ſtill abroad, the plaintiff applies for an injunction. It was ſaid it ſhould have been upon an affidavit of facts, the principal being abroad. But the Lord Chancellor held, that equitable grounds differ from all others brought before a Court, and upon paying the ſum of 1982 *l.*, into Court, an injunction was granted until the principal put in his anſwer, with liberty to proceed to judgment with a ſtay of execution.

22 Feb. 1788. Sir Lloyd Kenyon M. R. ſitting for Lord Chancellor.

Errington v. *Aynſly.*

A bill will not lie to compel the performance of an agreement to build an houſe; but it will to compel a conveyance of land, becauſe there is a thing certain to be conveyed.

BILL to be relieved againſt the penalty of a bond, conditioned for maintaining a bridge acroſs the *Tyne*, from *Hexham* in *Northumberland*; the bridge was deſtroyed by an extraordinary flood in one night, and the foundation of the river being ſo bad at that ſpot, as to make it impoſſible to build one that would ſtand; the cauſe came on to be heard, and after hearing the defendant's defence, his Honour put it off merely for the purpoſe, and in hopes, that the Juſtices of the Peace at the Quarter Seſſions and the plaintiff would ſettle matters, which he recommended: His Honour mentioned a caſe in the Court of Exchequer, in which he and Mr. *Madocks* were counſel, the name of the cauſe *Shakerly* v. Lord *Kilmurry*; the bill was to compel the defendant to keep up the bed and banks of a river, becauſe the not doing of it was permiſſive waſte, as it let the water out, and overflowed the adjacent grounds; his Honour put the following queſtion: Did you ever know an inſtance of a bill to compel a defendant to perform an agreement to build an houſe? Certainly not; but to compel a conveyance of land you may, becauſe there is a thing certain to be conveyed.

Edwards

Edwards v. *Pool.*

25 Feb. 1788. Sir Lloyd Kenyon M. R.

A defendant againſt whom the Serjeant at Arms was ordered to go, for not producing deeds purſuant to a decree, being a lodger and keeping himſelf locked up except on a Sunday, ſo that the Serjeant at Arms could not execute his warrant, and the plaintiff being, as it was ſuppoſed without remedy, applied by motion, that a commiſſion of rebellion might iſſue to commiſſioners who can break locks, &c. but it was denied; it being a writ, which if warranted, iſſues of courſe.

AN application quite out of courſe being intended to the Lord Chancellor, but he being confined by illneſs, was the above day made to the Maſter of the Rolls; the Regiſter thought it his duty, to apprize his Honour of it, as he had his Lordſhip before, what the intended application was, and the caſe on which it was meant to be grounded; and premiſed, that the eſtabliſhed practice and courſe of proceeding againſt a party for not performing a duty decreed, (except for not producing deeds before the Maſter, or putting in his examination), is by attachment, attachment with proclamation, commiſſion of rebellion. Theſe are iſſued of courſe without an order; muſt be iſſued and returned, and if *non eſt inventus* be returned, the next proceſs is the Serjeant at Arms, which is by order.

For not producing deeds, &c. before the Maſter, purſuant to a decretal order, the common and uſual courſe is, to apply in the firſt inſtance for an order, upon the Maſter's certificate, that the party do produce, &c. in four days, or that the Serjeant do apprehend the defendant, and bring him into this Court to anſwer his contempt: ſhould the party be taken, he is brought into Court, and turned over to the Fleet, and thereupon the Court will of courſe grant a ſequeſtration.

So if the Serjeant at Arms return *non eſt inventus*, the Court will upon ſuch return, (ſee printed orders of Court, fol. 203, concerning the Serjeant at Arms), grant a ſequeſtration.

Edwards v. Pool.

The ground of the application is, that by the decree, accounts are directed, and the eſtate in queſtion to be ſold; and in order thereto, all deeds, &c. in the cuſtody or power of any of the parties, are to be produced before the Maſter.

The defendant in whoſe cuſtody the writings are, refuſing to produce them though ſummoned, the common order, upon the Maſter's certificate, for the Serjeant at Arms to apprehend, and bring the defendant into Court hath been granted: The defendant is a lodger, and keeping himſelf ſhut up in his apartments, except on a *Sunday*, the Serjeant at Arms cannot execute his warrant.

The plaintiff upon a ſuppoſition he is without remedy, intends to apply for an order, that he may be at liberty to ſue out a commiſſion of rebellion, (a proceſs, as before obſerved, that is never uſed in ſuch a contempt as the preſent, but if iſſued, is without order, and is ſued out of courſe), for that ſuch writ as it is ſaid, may be executed on a *Sunday*, and according to *Crompton* p. 47, 'the Commiſſioners 'may break open the party's houſe, or the houſe of 'another where he is.'

Suppoſe the Court ſhould grant the order, and the plaintiff ſhould ſue out a commiſſion of rebellion, the Commiſſioners can only attach the body, and bring the party into Court; their authority doth not extend to his property; but with great ſubmiſſion, the plaintiff hath his remedy in the ordinary way, if he will purſue it: He hath an order for the Serjeant at Arms to apprehend and bring the defendant into Court; he can, or he cannot apprehend him; if he doth, he will bring the defendant into Court, and he will be turned over

over to the Fleet, and thereupon the Court will of courſe grant a ſequeſtration; if he return a *non eſt inventus*, upon ſuch return, the Court will likewiſe order a ſequeſtration, which not only goes as originally *ad rem*, but to all the perſonal property of the contemnor.

Should he keep the door of his apartments ſhut, and refuſe to deliver poſſeſſion to the ſequeſtrators, the Court will of courſe upon their certificate, grant an order, to enjoin him to deliver poſſeſſion to the ſequeſtrators, and upon ſervice of the order, and diſobedience, an attachment iſſues of courſe, (which is not to be executed), and upon this the Court will order a writ of aſſiſtance, to put the ſequeſtrators into poſſeſſion: So it was ordered by Lord *Hardwicke* in *Bird* v. *Littlehales*, 19th *March* 1742, the defendant was in contempt to a ſequeſtration, for not performing a decree, and kept his doors ſhut againſt the ſequeſtrators, and would not let them into poſſeſſion.

Bingham v. *Bingham*, the like, the 9th of *December* 1751.

On the 26th of *February* 1788, Mr. *Scott* made his intended motion: But his Honour taking notice of what had been ſubmitted to him, adopted the reaſons, and denied the motion.

28 Feb. 1788. Sir Lloyd Kenyon M. R. ſitting for Lord Chancellor.

Sweet v. *Partridge.*

Where ſatisfaction is ſought out of real aſſets deſcended to an infant heir, ſo that the parol may demur, the Court will appoint a receiver of the real eſtate deſcended.

BILL by creditors, for ſatisfaction out of the perſonal aſſets, and if not ſufficient, out of the real aſſets deſcended to an infant heir: On hearing the cauſe, accounts of the inteſtate's debts, and of his perſonal eſtate were directed, and directions were alſo given for payment of the debts; but as to directing ſatisfaction out of the real aſſets deſcended, his Honour ſaid he could not, becauſe the parol might demur: It was then preſſed to have a receiver appointed of the ſaid real eſtates, the propriety of which his Honour doubted, though he ſaid it was his wiſh to do it; and upon the Counſel ſaying, it had been done by the Lords Commiſſioners in *July* 1783, in a cauſe *Docker* v. *Horner*; and ſince by Lord *Thurlow*, on a motion before the hearing, (which to my knowledge he did, but I cannot at preſent recollect *the title of the cauſe*), his Honour gave the Counſel leave to mention it on a future day.

Mr. *Scott* mentioned it this day, and produced the decree in *Docker* v. *Horner*: His Honour ſaid he was pleaſed to find an inſtance; that he was certain the parol demurring was to the diſadvantage of an infant, and ordered a receiver to be appointed of the real eſtate deſcended.

Smith

Smith v. *Morris.*

1 March 1788. Sir Lloyd Kenyon M. R. 2 Bro. C.C. 31. S. C.

ON a bill brought for the purpoſe of getting rid of a leaſe, offering to ſurrender it, and to make all poſſible ſatisfaction, which the defendant reſiſted; it was ſaid by Sir *Lloyd Kenyon* M. R., that this Court will not decree contracts to be carried into execution, merely for the purpoſe of haraſſing parties. *Hales* v. *Dodd*, cited 2 *Atkins*, was mentioned.

Price v. *James.*

5 March 1788.

DEMURRER to a bill for want of equity.

Lord *Thurlow* C.—The bill prays diſcovery and relief: the plaintiff makes the diſcovery ancillary to the relief: I have thought of it often, and know there are opinions for it, but I think a demurrer will lie; therefore allow the demurrer.

E

eynon v. *Collins.*

5 March 1788. 2 Bro. C.C. 323. S. C.

ON a *devaſtavit* by the huſband of an executrix or adminiſtratix, of the eſtate of her teſtator or, inteſtate; this Court will charge the wife, after the death of her huſband.

Caſes cited: *Cro. Car.* 564; *Vaughan* v. *Morris*, *Dyer* 210; *Wentworth's Law of Executors*; *Comyns Digeſt*, under title of *Adminiſtrator*.

Per Curiam.—Decree the wife to pay the money found due, on account of the *devaſtavit*.

Jeremiah

2 April 1788.
2 Br. C.C. 324.
S. C.

Jeremiah Bixly, on behalf of himſelf and the reſt of the creditors of *Francis Eley* deceaſed, } Plaintiffs.

Sarah Eley the widow of the ſaid *Francis Eley*, *John Humphrey* and *John Steane*, the executors; *Sarah Eley* an infant, the daughter of the ſaid *Francis Eley*; *John Eley* the younger, and *James Young*, and his wife } Defendants.

Defect of the ſurrender of a copyhold eſtate, ſupplied for the benefit of creditors.

THE bill was for an account and payment of the teſtator's debts out of his perſonal eſtate, and if not ſufficient, out of his copyhold eſtates deviſed for that purpoſe, (which not having been ſurrendered), to have that defect ſupplied; and if the copyhold eſtate ſhould not be ſufficient, to have the deficiency raiſed out of other real eſtates of the teſtator, which he had ſpecifically deviſed.

The bill ſtated that the teſtator was ſeiſed of copyhold eſtates, and likewiſe of freehold eſtates; that on the 20th of *January* 1783, he made his will, and thereby willed, that his executors, their executors, adminiſtrators, or aſſigns, ſhould as ſoon as conveniently could be after his death, ſell his copyhold eſtate, (which he deſcribed), in truſt, to apply the money to ariſe thereby, and the rents and profits till ſold, for and towards payment of his debts, ſpecial and ſimple; and if there ſhould be any reſidue, he willed his executors ſhould place the ſame out at intereſt, until *Sarah* his daughter ſhould attain twenty-one, when the ſame ſhould be paid to her, and the intereſt to ariſe during

during her minority, to be applied towards her maintenance and education; if she died before twenty-one, he gave the principal money to his wife; he devised to his wife *Sarah*, and to her heirs and assigns, all his messuages, lands, &c. by description, at *Thorpe*, and devised unto his executors, their heirs, and assigns, until his said daughter *Sarah* should attain twenty-one, all his messuages, lands, &c. by description, at *Bradford*, to apply the rents and profits for her maintenance, and when she attained twenty-one, he devised the said last mentioned lands, &c. to his said daughter in fee simple; if she died before without issue, he devised the same to his said wife for life, and after her death, to his brother *John Eley* for life; and after his death, to his nephew *John*, in fee simple; and gave to *John Montford* and *John Stean* whom he named jointly with his said wife executors of his will, and gave them 10 *l.* each for their trouble; and gave the residue of his personal estate to his said wife. The testator died, and his executors proved his will, possessed his personal estate, and entered on, and received the rents and profits of the real estates devised to them, but neglecting to pay his debts, under pretence that the copyhold estate devised in aid of the personal, was not surrendered to the use of the will, the plaintiff filed his bill for the above purpose, insisting that the copyhold estate being devised for the payment of debts, the defect of its not having been surrendered ought to be supplied.

The cause was heard on the 11th of *February* 1786, when the will was declared well proved, and decreed to be established, and an account of the personal estate, and an application of it, in payment of his

Bixly et al. v. *Eley* et al.

debts, was likewiſe decree
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teſtator's debts.

On the 2d *April* 1788, t
before Lord *Thurlow* for
Mr. *Mansfield* and Mr. *Ai*
where a copyhold eſtate wa
teſtator died ſeiſed of freeh
ſhould be firſt reſorted to,
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deviſed to his wife and d
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The will not having been
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ıip articles under which ound, pointed out the hat theſe ſteps had not and it was ſeen what iff had no buſineſs here, a. *Halſted* v. *Jennings.*

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ord *Byron.*

9 May 1788. Lord Thurlow C.

d againſt the defendant, g or uſing the ſhuttles, ſwer and further order; been guilty of a breach gave notice, and moved defendant, which, after es, was granted. *Byron* moved to diſcharge on for irregularity, for

Application to diſcharge a ſequeſtration iſſued againſt the defendant for breach of an injunction to ſtay waſte, upon the ground that the defendant had put in his anſwer, and that therefore it was irregular; but as the injunction was in force, the defendant not having applied to diſſolve it, the Court denied the motion.

olve the injunction.

over; and Mr. *Green*, rected to mention it to Lordſhip's pleaſure, I njunction ſhould be irre- be obeyed, as was laid *Woodward* v. *King* (*a*),

(*a*) 2 Ch.C.203.

ience whether the injunc- ular; the Court thought to prevent the defendant until anſwer and further ved, and till then it was

to

Watkins v. *Buſh.*

to apply to diſcharge the order to amend for irregularity.

[But query: As the cauſe is out of Court, how could he apply? And whether it would not be more adviſeable for the defendant not to pay the leaſt regard to any ſtep the plaintiff might take, and leave it to the plaintiff to juſtify any unwarrantable meaſure he might adopt to compel the defendant to pay obedience to it? J. D.]

Halſhed v. *Jenning.*

30 April 1788. Sir Lloyd Kenyon M. R. 2 Bro. C.C. 336. S. C.

Plea to a bill for a diſcovery, and an account of partnerſhip dealings and tranſactions. A clauſe in the partnerſhip articles, that no bill &c. ſhould be brought until the matter had been referred to arbitrators, and their arbitration, and their award made, pleaded, and allowed.

BILL by one of the ſurviving partners againſt another partner, and the repreſentative of a deceaſed partner, for an account of the partnerſhip dealings and tranſactions, and for a production and diſcovery: The defendant pleaded, and ſtated in the plea a clauſe in the partnerſhip articles, by which it was covenanted, that no bill, ſuit, &c. ſhould be brought reſpecting the partnerſhip, until the matter ſhould have been referred to arbitration, and the arbitrator ſhould have made his award.

For the plaintiff it was ſaid, that where a plea went to the relief and diſcovery, it might be good as to the relief, but not to the diſcovery; and *Wellington* v. *Mackintoſh*, 2 *Atk.* 569; and *Fletcher* v. *Raymond*; before Lord *Thurlow*, were cited.

His Honour took notice of the ſtatute of the 9th of King *William* the 3d, intituled, "An act for determination of differences by arbitration;" and ſaid, that arbitrators under an agreement of the party have not power to call witneſſes before them, and to exa-

mine

mine them; that the partnerſhip articles under which the parties acted and were bound, pointed out the previous ſteps to be taken; that theſe ſteps had not been taken; that till then, and it was ſeen what would be the award, the plaintiff had no buſineſs here, and therefore allowed the plea.

Halſhed v. *Jennings.*

Robinſon v. Lord *Byron.*

9 May 1788. Lord Thurlow C.

THE injunction having iſſued againſt the defendant, to ſtay him from working or uſing the ſhuttles, flood-gates, &c. until his anſwer and further order; and the defendant having been guilty of a breach of the injunction, the plaintiff gave notice, and moved for a ſequeſtration againſt the defendant, which, after hearing Counſel on both ſides, was granted.

On the ſecond Seal Lord *Byron* moved to diſcharge the order for the ſequeſtration for irregularity, for that he had put in an anſwer.

He had not applied to diſſolve the injunction.

It was ordered to ſtand over; and Mr. *Green*, who then attended, was directed to mention it to me; and agreeably to his Lordſhip's pleaſure, I ſubmitted that although an injunction ſhould be irregularly iſſued, yet it was to be obeyed, as was laid down by Lord *Nottingham*, in *Woodward* v. *King* (*a*), *Mich.* Term, 26 *Car.* 2.

It therefore was of no conſequence whether the injunction was ill-founded, or irregular; the Court thought proper to grant an injunction to prevent the defendant from doing further miſchief until anſwer and further order; it had not been diſſolved, and till then it was to

Application to diſcharge a ſequeſtration iſſued againſt the defendant for breach of an injunction to ſtay waſte, upon the ground that the defendant had put in his anſwer, and that therefore it was irregular; but as the injunction was in force, the defendant not having applied to diſſolve it, the Court denied the motion.

(*a*) 2 Ch. C. 203.

Robinſon v. Lord Byron.

to be obſerved; and the defendant's having done what he was expreſly enjoined from, and his perſon being privileged, a ſequeſtration was ordered to iſſue againſt him: it was to be obſerved, not in meſne proceſs, but for breach of a duty. And it might not be improper to attend to the order for the ſequeſtration: It ſtates the order for the injunction to ſtay the defendant, his ſervants, and that the defendant had been ſerved with the injunction from working, or uſing the ſhuttles, &c.: It further ſtates, that the defendant had, in violation of the injunction, done what he was enjoined from; that the plaintiff had thereby ſuſtained great injury; and therefore for breach of the injunction, after hearing Counſel on both ſides, it was ordered that a ſequeſtration ſhould iſſue until further order. Had the defendant been a commoner, the language of the order would have been, 'until he cleared his contempt, and the Court ſhould make further order.' And it was ſubmitted, that although the word *contempt* was not uſed, the offence was the ſame as if committed by a common perſon, and if he had not been privileged, he would have been committed; the mode of proceeding for a contempt ſuch as the preſent.

On application of a party to be diſcharged for a contempt, the Court conſiders the natute of it and the conduct of the party, and whether he hath done all he ought, or could do, in ſatisfaction for his breach of the duty, to the party injured.

For inſtance: where a defendant is in contempt for taking out execution on a judgment at law, the Court will, before they diſcharge him, make him do away every thing beyond the limit he was permitted to proceed,

as

as your Lordſhip did in *Williams* v. *Axe*, 13th *April* 1779. *Robinſon* v. Lord *Byron*.

The ſheriff had levied money under a judgment before the bill was filed; after an injunction had iſſued to ſtay the defendant's proceeding at law, the defendant attached and received the money from the ſheriff, your Lordſhip took this diſtinction, and ſaid that if the ſheriff voluntarily paid the money, it would not have been a breach of the injunction; but as the defendant compelled the ſheriff to pay it, it was ſuch breach; and ordered the defendant to return the money.

The injunction, as before obſerved, is until anſwer and further order, and though the defendant hath put in his anſwer, yet it is not thereupon diſſolved of courſe; and as he hath applied to diſſolve the injunction, it ſtill ſubſiſts, and ſo long as it doth ſubſiſt, the Court will enforce it. And when application for ſuch purpoſe ſhall be made, it may happen the Court may take into conſideration the matter of the injunction, and the paſt conduct of the defendant, as Lord *Hardwicke* did in the caſe of the Attorney General v. *Burrows*, 6th *May* 1747 (*a*); and in an anonymous caſe in 3 *Atk.* 567: An injunction to ſtay waſte on filing the bill had been granted; the defendant, on the putting in of his anſwer, (by which he ſaid, that ſince filing the bill he had not committed waſte), applied to diſſolve it: His Lordſhip ſaid, as the defendant had committed waſte, the Court will preſume he may do more, and therefore denied the motion. So likewiſe in *Vane* v. Lord *Bernard*, 2 *Vern.* 738, by Lord *Cowper*.: The defendant was tenant for life without impeachment of waſte, remainder to his ſon, the plaintiff, for life; out of ſome diſpleaſure to the plaintiff he

(*a*) Supr. 118.

Robinſon v. Lord Byron.

wilfully pulled down and injured part of Raby Caſtle; on filing a bill by the plaintiff, an injunction to ſtay waſte was granted; and on the defendant's putting in an anſwer, and applying to diſſolve it, his Lordſhip continued the injunction until the hearing, and at the hearing not only made it perpetual, but ordered the Caſtle to be repaired and put in the ſtate it was in at a given period, and a commiſſion to iſſue to ſee what was to be done, and the Maſter to ſee it done at the expence of the defendant.

In the caſe before your Lordſhip, the acts of the defendant before filing the bill, and the injunction, might proceed from a miſconception of his right; but the injunction having explicitly pointed out to him what he was not to do, what he hath done in violation of it, is wilful: The intention of the Court by iſſuing the injunction was to prevent him; the injunction hath not been diſſolved, and ſo long as it ſubſiſts, it is to be obeyed; it was in force at the time he diſobeyed it, and at the time the ſequeſtration was applied for, and ordered to iſſue; and therefore, it was ſubmitted, the application and the order were well founded. The motion came on again the above 9th day of *May* 1788, when his Lordſhip was pleaſed to adopt what was ſubmitted to him, and ordered that the plaintiff ſhould be at liberty to bring an action as adviſed, and proceed to trial; and that the injunction and ſequeſtration ſhould continue until after the trial or further order.

Windſor

Windſor v. *Windſor.*

24 Jan. 1788. Sir Lloyd Kenyon M. R.

Naming a party in a bill, as a defendant, unleſs proceſs is prayed againſt him, an objection at the hearing that he is not a party, will be allowed.

THE firſt tenant in tail in remainder was named a party defendant in the bill, but proceſs was not prayed againſt him, and he was abroad: Objection was taken at the hearing of the cauſe for want of parties.

Per Curiam.—The naming of a party in a bill as a defendant, and not praying proceſs againſt him, is not to be conſidered as making him a party; therefore let the cauſe ſtand over, with liberty for the plaintiff to amend the bill by adding parties.

Bedford v. *Leigh.*

27 June 1785. Lord Thurlow C.

Bill by a ſingle bond creditor, to be ſatisfied out of perſonal and real aſſets: the bill, after conſideration, diſmiſſed, ſo far it prayed ſatisfaction out of the real eſtate.

THE plaintiff was mortgagee in fee of particular eſtates, late belonging to *John Burrel Leigh*, deceaſed, with the uſual covenant to pay, and an additional ſecurity of a bond: the mortgagor died inteſtate, leaving the defendant *Leigh* his heir at law, and the defendant *William Huxly* took out adminiſtration to him. The mortgaged premiſes being a deficient ſecurity, as the bill ſtated, the plaintiff prayed by his bill that the defendants might redeem, or that the mortgaged premiſes might be ſold, and the purchaſe money applied in payment of what ſhould be due on the mortgage, and if deficient, that the plaintiff might be paid what remained due to him out of the perſonal eſtate; and if that ſhould alſo be deficient, that the deficiency might be made good out of other real eſtates of the inteſtate deſcended, and for that pur-

Belfour v. Lee.

poſe, that the ſame might be ſold. The cauſe was heard the above day, and the Counſel ſaying it was quite of courſe, the caſe was not attended to; and I was ordered to draw up a decree, according to the prayer of the bill. Upon reading the prayer, not having heard of the Court's going ſo far as to decree ſatisfaction to a ſingle creditor, out of legal, or equitable aſſets, I mentioned it to the Lord Chancellor this day(*a*): The Lord Chancellor ſeemed, at firſt, to wonder at my difficulty, as the plaintiff, under his covenant, was a creditor by ſpecialty for the remainder of his debt, after applying the money ariſing by ſale of the mortgaged premiſes, as far as it would go, in diſcharge of the mortgage, and aſked if he could not at law have gone to an *elegit*, and recovered out of the real eſtate? And aſked me the grounds of my difficulty? My anſwer was: In the firſt place, it was novel; that I had never heard of a decree upon a bill by a ſingle creditor, not on behalf of himſelf and the reſt, go to real aſſets; (and Mr. *Ambler*, and Mr. *Madocks*, on being applied to, gave the like anſwer); that his Lordſhip, in *Machin* v. *Graves*, which came on before him the 17th of *July* 1799, had doubted even of relieving a ſingle bond creditor *out of perſonal aſſets*; but on ſearching by his order for, and producing precedents, his Lordſhip had made ſuch decree; that the language of ſuch decrees was neceſſary to be attended to, for they did no more than direct an account of what was due to the plaintiff, (not a general account of debts), for the executors or adminiſtrators to pay out of aſſets in a *courſe of adminiſtration*: and in caſe they did not admit aſſets to account for the perſonal eſtate: that ſuppoſing his Lordſhip

(*a*) 29 June 1785.

Lordſhip ſhould confirm what I underſtood to be his direction, and the real eſtate deſcended ſhould be ſold, how was the purchaſe money to be applied? Legal aſſets were ſubject to all ſpecialty debts; there might be ſome of a ſuperior nature to the plaintiff's, for inſtance, a judgment; the account of debts was not general, and if it had been ſo, the language of the decree would have been to apply the money to ariſe by the ſale of the real eſtate deſcended, (which, if not ſufficient, an account of the rents and profits would have been directed), in making good the deficiency of the perſonal eſtate, to anſwer *not one*, but all the creditors by ſpecialty; and the aſſets being legal, the decree would have gone on, "And in caſe any of the "creditors by ſpecialty ſhall exhauſt any part of the "perſonal eſtate of the inteſtate, the ſimple contract "creditors are to ſtand in their place to receive ſatiſ-"faction *pro tanto*, out of the inteſtate's real eſtate." His Lordſhip, at the riſing of the Court, ſaid he had revolved it in his mind, and put this queſtion, Suppoſing the eſtate ſhould be ſold, muſt not the money be paid to the heir? And ſaid that the eſtate could not be ſold under an *elegit*; that the creditor could only hold till he was ſatisfied his debt, and muſt account for what he ſhould receive; that he was perfectly ſatisfied my doubt was well founded, and ordered the bill to be diſmiſſed, ſo far as it prayed ſatisfaction out of the real eſtate deſcended.

Bedford v. *Leigh.*

5 July 1788. *Hall* v. *Hall.*

REPRIZAL was ſaid by Lord *Thurlow* C. to be a common drawback.

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8 Nov. 1788. Ex parte *Swinney.*

IT was ſaid by Mr. *Manſfield*, in arguing the petition, which was in bankruptcy, and upon an exception, for that the Maſter had charged the aſſignee with a bond made to him by a debtor, which he had not received; that if a debtor aſſign a choſe in action, it lies with the aſſignor to call upon the aſſignee to uſe diligence to recover it; and unleſs the aſſignor ſo call upon him, the aſſignee will not be liable, ſhould any loſs happen by not calling it in: But if it be part of the agreement that he ſhall exert himſelf, or if called upon, he will not, he may be liable: Earl *Ranelagh* v. *Hays*, 1 *Vern.* 189. Lord Chancellor ſaid, he was clear that where a man receives a bond for a debt due to him, he makes it his own; and therefore diſmiſſed the petition, and overruled the exceptions, abating ſo much as commiſſion at 5 *l. per cent.* amounts to.

Bowes

Bowes v. Counteſs *Strathmore*, et è contra.

29 Nov. 1788. Mr. Juſtice Buller ſitting for Lord Chancellor.

A defendant, a priſoner in the King's Bench Priſon, under a criminal proſecution, brought up by habeas corpus, and turned over to the priſon of the Fleet pro forma, (to ground an order for a ſequeſtration); and from thence carried back to the King's Bench, with his cauſe; and immediately then a ſequeſtration moved for and granted.

THE defendant *Bowes*, brought up by *habeas corpus*, by the marſhal of the King's Bench Priſon, where he was confined under a criminal ſentence, for not obeying a decree; and the Court being informed it was neceſſary he ſhould be turned over to the priſon of the Fleet, to ground a ſequeſtration, rather pauſed, as he was confined under a criminal proſecution, but after conſideration, made the following order: "It appearing the defendant *Bowes* is a "priſoner in the King's Bench Priſon, on a criminal "proſecution, let him be turned over to the priſon "of the Fleet *pro formâ*, for the purpoſe of ground-"ing an order for a commiſſion of ſequeſtration; and "from thence let him be carried back to the King's "Bench Priſon, with his cauſe."

Hales v. *Shafto*.

29 July 1790.

Sequeſtrators cannot ſell goods ſequeſtered, in meſne proceſs, otherwiſe than to pay the coſts of the contempt to be taxed.

THE ſame day a ſequeſtration iſſued on meſne proceſs againſt a member of parliament, for not appearing to a bill filed againſt him for a diſcovery; ſo that the taking of the bill *pro confeſſo*, under the ſtat. of 5th *Geo.* 2. would not be of any avail. The defendant perſiſting in his contempt, application was made on a former day, and renewed this, that the ſequeſtrators might ſell the goods ſequeſtered, &c. Lord *Thurlow* C. after conſideration, denied the motion, ſaying, that ſequeſtraors in meſne proceſs could not ſell, &c. any otherwiſe than to pay the coſts of the contempt to be taxed.

Tidd v. *Clare.*

17 Dec. 1788.

DEMURRER to the whole bill, the defendant having anſwered part; the demurrer was overruled.

Scott v. *Tyler* (*a*).

Lord *Thurlow* C.

10 Dec. 1788.
2 Bro. C. C. 431
S. C.

A condition annexed to a legacy, that the legatee ſhall marry with the conſent of her mother, is a valid condition, and upon marriage without ſuch conſent, it ſhall go to the mother under a gift of a general reſidue.

THIS is a bill filed by *Samuel Scott* and *Margaret Chriſtiana* his wife, againſt *Elizabeth Tyler*, the reſiduary legatee, and executrix of *Richard Kee*; *George Shakeſpeare*, *Charles Maybrew*, and *Philip Nind*, executors and truſtees, named in the will of the ſame *Richard Kee*; and *Richard Dryer*, his heir at law.

The bill prays That the plaintiff *Margaret Chriſtiana*'s right may be eſtabliſhed in a truſt fund of 10,000 *l.* South Sea annuities, and that proper accounts may be directed accordingly.

That an account may alſo be taken of the produce of certain tenements, and of certain ſecurities upon the river *Lee*; and that the ſame may be duly paid and aſſigned to her.

And that the legacy of 100 *l.* given by the will of one *James Cockburn* may be paid to her.

For this purpoſe the bill ſtates the will of *Richard Kee*, made on the 16th day of *December* 1776, whereby he directs his executors to purchaſe 5000 *l.* South Sea annuities, of the year 1751, in their own names, but, in truſt, to pay 60 *l. per ann.* for the maintenance of *Richard Dryer* till his age of fifteen, and from thenceforward 120 *l. per ann.* with liberty to raiſe 400 *l.* to put him out in ſome trade or profeſ-

(*a*) This cauſe ſtood for judgment. His Lordſhip having read his judgment, which was written, gave it to me: The following is correctly copied from it. J. D.

ſion'

ſion, the ſurplus profits to be inveſted in the like annuities, and the whole to be transferred to him at twenty-one; but if he dies in the mean time, the whole is to be thereupon divided between the defendant *Elizabeth Tyler* and the plaintiff *Margaret Chriſtiana*; the ſhare of *Margaret Chriſtiana* not to be transferred to her till her age of twenty-one; and if ſhe dies ſooner, her ſhare is to go over to *Elizabeth*.

He alſo directs his executors to purchaſe the ſum of 10,000 *l.* in the like annuities, in their own names, in truſt, to pay *Elizabeth Tyler* 100 *l. per ann.* for the maintenance of *Margaret Chriſtiana*, till her age of twenty one; the ſurplus to be laid out in the mean time in the like annuities, at her age of twenty one, if then unmarried, one moiety is to be transferred to *Margaret Chriſtiana*, for her own uſe and benefit; and at her age of twenty-five, if then unmarried, the remainder to be transferred in like manner.

If ſhe marries with the conſent of *Elizabeth* before twenty one, a moiety of the whole ſum is to be ſettled to her ſeparate uſe, and for her iſſue, according to the diſcretion of *Elizabeth*; the other moiety is to be diſpoſed of, as *Margaret Chriſtiana* ſhall think fit; if ſhe dies unmarried before her age of twenty five, the whole is to go over to *Elizabeth*.

He alſo gives to the ſame truſtees, certain freeholds in *Denmark Court* in truſt, to lay up the rents till *Margaret Chriſtiana* ſhall attain twenty-one, whereupon he gives both the eſtates and their produce to her abſolutely; or if ſhe dies ſooner, to *Richard Dryer*, or if ſhe be then dead, to *Elizabeth Tyler*.

He gives to the ſame truſtees, his ſecurities on the river *Lee*, in truſt, to apply the produce thereof, to the

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the ſeparate uſe of *Margaret Chriſtiana*, notwithſtanding her coverture, till twenty-one, and thereupon to her abſolutely, but if ſhe dies ſooner to *Elizabeth* abſolutely.

He gives divers other legacies. All the reſt of his eſtate, real and perſonal, he gives to *Elizabeth Tyler* abſolutely, whom he looks upon as a wife.

He died on the 3d of *November* 1776, leaving *Elizabeth* ſurviving, and *Margaret Chriſtiana* his natural daughter by her.

On the 17th *May* 1783, the plaintiff *Samuel Scott*, clandeſtinely and againſt the will of *Elizabeth*, married *Margaret Chriſtiana*, then an infant of eighteen years: *Elizabeth* objected to it as an improvident match, by reaſon of his inferior circumſtances, his advanced age, and the family which he had by one of his former wives; and warned her daughter of the conſequence.

And, as the plaintiff *Samuel Scott* ſtates, by a deed of 13th *May* 1783, he has covenanted to ſettle *Margaret Chriſtiana*'s fortune on her, and her children, after his own death, if ſhe or they ſhould ſurvive him.

The bill further ſtates the will of *James Cockburn*, who died in *October* 1774, leaving *Elizabeth Tyler* his executrix, and *Margaret Chriſtiana* a legatee of 100 *l.*

All the executors proved *Richard Kee*'s will, *Elizabeth Tyler* alone acted.

Elizabeth Tyler forthwith transferred 5000 *l.* South Sea annuities into the names of the truſtees, which have been ſince transferred to *Dryer*, together with the accumulations, and that legacy has been duly diſcharged.

In

In *Auguſt* 1777, ſhe transferred 10,000 *l.* South Sea annuities, into the names of herſelf and co-truſtees, together with the further ſum of 1000 *l.* of like annuities, whereof ſhe has conſtantly received the produce: ſhe received in like manner, the rents of the freehold houſes, and the intereſt of the ſecurities on the river *Lee*.

She admits the legacy of 100 *l.* to remain due and that ſhe had aſſets, but claims a debt of 900 *l.* againſt the plaintiff *Samuel Scott*.

In *March* 1786, *Elizabeth Tyler* became a bankrupt; a commiſſion iſſued, and Sir *Edward Vernon*, *Thomas Hankey*, *John Marr*, and *Malcolm Cockburn* were choſen aſſignees. It appears alſo that *Elizabeth* being greatly indebted to her bankers, *Thomas Hankey*, *Chaplin Hankey*, *Robert Hankey*, *Stephen Hall*, and *Richard Hankey*, for money advanced to her, to carry on certain tranſactions in trade, which ſhe had entered into on her own account, after the death of the teſtator, they opened certain boxes, which had been depoſited with the bankers for ſafe cuſtody by *Richard Kee* in his life-time, and by her after his death; and took out ten bonds ſecurities on the river *Lee* for 100 *l.* each, numbered from 170 to 180, the laſt number incluſive, and depoſited them among other things, as a ſecurity for the monies already advanced, or to be advanced by the bankers, and ſhe is now in their debt more than all the ſecurities ſhe depoſited with them are worth.

Hereupon the ſuit was revived againſt the aſſignees; and the bankers were called upon to account for the ten bonds ſo depoſited with them, and the intereſt received upon them, as being the property of the plaintiffs,

1789. Dyer. plaintiffs, by reaſon of the above mentioned ſpecific bequeſts.

Upon this matter two queſtions have ariſen; the reſt of the caſe being much of courſe; Firſt, whether as the caſe ſtands, the plaintiffs have any, and what intereſt, in the 10,000 *l.* South Sea annuities; Secondly, whether the bankers are entitled to hold the ten bonds on the river *Lee*, as a ſecurity for the money due to them by the bankrupt.

The teſtator makes four ſeveral bequeſts to his daughter; a contingent intereſt in the 5000 *l.* South Sea annuities originally given to *Dyer*; the 10,000 *l.* South Sea annuities in queſtion; the freehold tenements; and the *Lee* bonds; all upon the event of her living till the age of twenty-one, married, or unmarried: If ſhe dies before twenty-one, the firſt, third, and fourth bequeſts take no place, and yet the intereſt of the fourth is to be paid to her ſeparate uſe, notwithſtanding her coverture, during her infancy; but there is an event, upon which the ſecond bequeſt may take place before twenty-one, namely, if ſhe marries before that age with conſent of her mother.

It is impoſſible not to ſuſpect, that the teſtator has failed of expreſſing his full intention concerning this bequeſt of the 10,000 *l.*: He gave it to the daughter on a double contingency, her age, and being then unmarried; he ſeems to have meant it for the mother on the contrary event; but he has given it over alſo to her on a double contingency; the death of the daughter before her age, and unmarried. This leaves a middle caſe, the premature marriage of the daughter, in which neither can claim under the form of this

this bequeſt: Again, he has provided for the anticipation of the daughter's title by another double contingency; namely, marriage before twenty-one, and with conſent of the mother; but in caſe of a marriage between twenty-one and twenty-five, with or without conſent, half the legacy would remain undiſpoſed of; which it can hardly be imagined he meant.

Some endeavours were uſed to infer from the terms in which it was given to the mother, that in all other events, it was meant for the daughter; it is more probable, that in the caſe of the daughter's not becoming entitled, it was meant for the mother; but neither conjecture is ſufficiently collected from the actual expreſſion, by any admiſſible rules of interpretation.

The main argument for the plaintiff, turned on this propoſition, that one branch of the contingency, upon which the legacy was given, (or rather anticipated,) implied a condition in reſtraint of marriage, which is merely void, and conſequently the legacy became abſolute.

In ſupport of this poſition innumerable deciſions of this Court were quoted; but the caſes are ſo ſhort, and the dicta ſo general, as to afford me no diſtinct view of the principle, upon which the rule is laid down; or conſequently of the extent of the rule, or of the nature of the exceptions, to which it's own principle makes it liable.

The earlier caſes refer, in general terms, to the Canon law, as the rule by which *all* legacies are to be governed. By that law, undoubtedly, all conditions which fell within the ſcope of this objection, the reſtraint of marriage, are reputed void; and, as they ſpeak,

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ſpeak, *prò non adjectis*. But thoſe caſes go no way towards aſcertaining the nature and extent of the objection.

Towards the latter end of the laſt, and beginning of the preſent century, the matter is more looſely handled. The Canon law is not referred to, (profeſſedly at leaſt), as affording a diſtinct and poſitive rule for annulling the obnoxious conditions: on the contrary, they are treated as partaking of the force allowed them by the law of *England*. But, in reſpect of their importing a reſtraint of marriage, they are treated at the ſame time as unfavourable, and contrary to the common weal, and good order of ſociety. It is reaſoned, that parental duty and affection are violated when a child is ſtripped of it's juſt expectations. That ſuch an intention is improbably imputed to a parent; particularly in thoſe inſtances where there was no miſalliance; as in marriage with the houſes of *Bellaſes*, *Bertie*, *Cecil*, and *Semphile*; which the parent, if he had been alive, would probably have approved. Theſe ideas apply indifferently to bequeſts of lands, and of money, and were, in fact, ſo applied in one very remarkable caſe: nay, to avoid the ſuppoſed force of theſe obnoxious conditions, ſtrained conſtructions were made upon doubtful ſigns of conſent; and every mode of artificial reaſoning was adopted, to relax their rigour. This was thought more practicable by calling them conditions ſubſequent; although, if that had made ſuch difference, they were, and indeed, muſt have been generally, conditions precedent, as being the terms on which the legacy was made to veſt; at length, it became a common phraſe, that ſuch conditions were only *in terrorem*. I do not

find it was ever ſeriouſly ſuppoſed to have been the teſtator's intention to hold out the terror of that which he never meant ſhould happen; but the Court diſpoſed of ſuch conditions ſo as to make them amount to no more. *Scott v. Tyler.*

On the other hand, ſome proviſions againſt improvident matches, eſpecially during infancy, or to a certain age, could not be thought an unreaſonable precaution for parents to entertain. The cuſtom of *London* has been found reaſonable, which forfeits the portion on the marriage of an infant orphan without conſent. The Court of Chancery is in the conſtant habit of reſtraining and puniſhing ſuch marriages: and the Legiſlature has at length adopted the ſame idea, as far as it was thought general regulation could, in ſound policy, go.

In this ſituation the matter was found about the middle of the preſent century; when doubts occurred, which divided the ſentiments of the firſt men of the age. The difficulty ſeems to have conſiſted principally in reconciling the caſes; or, rather, the arguments on which they proceeded. The better opinion, or, at leaſt, that which prevailed, was, that deviſes of land, with which the Canon law never had any concern, ſhould follow the rule of the Common law; and that legacies of money, being of that ſort, ſhould follow the rule of the Canon law.

Lands deviſed, charges upon it, powers to be exerciſed over it, money legacies referring to ſuch charges, money to be laid out in lands (though I do not find this yet reſolved), follow the rule of the Common law, and ſuch truſts are to be executed with analogy to it.

Mere

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Mere money legacies follow the rule of the Canon law; and all truſts of that nature are to be executed with analogy to that.

But ſtill, if I am not miſtaken, the queſtion remains unreſolved, what is the nature and extent of that rule, as applied to conditions in reſtraint of marriage.

The Canon law prevails in this country only ſo far as it hath been actually received, with ſuch ampliations and limitations as time and occaſion have introduced; and ſubject at all times to the Municipal law. It is founded on the Civil law: conſequently the tenets of that law alſo may ſerve to illuſtrate the received rules of the Canon law.

By the civil law the proviſion of a child was conſidered as a debt of nature, of which the laws of civil ſociety alſo exacted the payment; inſomuch, that a will was regarded as inofficious, which did not in ſome ſort ſatisfy it.

By the poſitive inſtitutions of that law, it was alſo provided, *ſi quis cælibatûs, vel viduitatis conditionem hæredi, legatariove injunxerit; hæres, legatariuſve é conditione liberi ſunto; neque eo minus delatam hæreditatem, legatumve, ex hac lege, conſequantur.*

In ampliation of this law, it ſeems to have been well ſettled in all times, that, if inſtead of creating a condition abſolutely enjoining celibacy, or widowhood, the ſame be referred to the advice or diſcretion of another, particularly an intereſted perſon, it is deemed a fraud on the law, and treated accordingly; that is, the condition ſo impoſed is holden for void.

Upon the ſame principle, in further ampliation of the law, all diſtinction is aboliſhed between precedent,

and ſubſequent conditions; for it would be an eaſy evaſion of ſuch a law, if a ſlight turn of the phraſe were allowed to put it aſide. It has rather, therefore, been conſtrued, that the condition is performed by the marriage, which is the only lawful part of the condition, or by aſking the conſent, for that alſo is a lawful condition: and, for the reſt, the condition not being lawful, is holden *pro non adjectâ*. Scott v. Tyler.

On the other hand, the ancient rule of the Civil law has ſuffered much limitation in deſcending to us.

The caſe of widowhood is altogether excepted by the novels; and injunctions to keep that ſtate are made lawful conditions.

So is every condition which does not, directly, or indirectly, import an abſolute injunction to celibacy.

Therefore, an injunction to aſk the conſent, as I have ſaid before, is a lawful condition; as not reſtraining marriage generally.

A condition not to marry a widow is no unlawful injunction, for the reaſon given before.

So of an annuity to a widow during her widowhood.

A condition to marry or not to marry *Titius* or *Mævia* is good, for this reaſon, that it implies no general reſtraint; beſides, in the firſt caſe, it ſeems to have a bounty to *Titius* or *Mævia* in view.

In like manner, the injunction which preſcribes the due ceremonies, and the place of marriage, is a lawful condition, and is not underſtood as operating the general prohibition of marriage.

Still more is a condition good which only limits the time to twenty-one, or any other reaſonable age, pro-

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vided this be not evaſively uſed as a covered purpoſe to reſtrain marriage generally. And this muſt obtain ſtill more forcibly where the *lex loci* implies the ſame reſtraint.

Nay, according to *Godolphin*, the uſe of a thing may be given during celibacy; for the purpoſe of intermediate maintenance, will not be interpreted maliciouſly to a charge of reſtraining marriage.

It ſeems alſo agreed on all hands, that when, on any condition, however reſtrictive of marriage, the legacy is given over to pious uſes, the intention of the party ſhall be deemed to regard thoſe uſes, and not to have aimed at the objectional purpoſe of reſtraining marriage.

As we receive the Canon law, a bequeſt over to any purpoſe, or perſon, ſhall be interpreted in the ſame manner, and make a conditional limitation.

It was made a queſtion formerly what a legatee ſhould take on her marriage, under a bequeſt of 200 *l.* if ſhe married, or 100 *l.* if ſhe did not. Some thought 300 *l.*, ſome 200 *l.*, ſome 100 *l.* In our books we find it determined formerly in the caſe of a greater legacy given upon marriage with conſent, or after a certain age, and a leſs in the other events, that the greater legacy was not forfeited, by marrying againſt the condition; but thoſe deciſions happened in the period alluded to before, when the worth of the alliance was thought a ſufficient reaſon for a favourable interpretation, as it was called, of the condition; but Lord *Cowper* determined otherwiſe, on alternative bequeſts.

It is true that the foregoing limitations, which are detailed in *Swinburn*, and *Godolphin*, are not found in our

our reports ſo expreſsly ſtated, but the caſes did not call for ſuch particularity, except thoſe few alluded to before, which turned upon the looſer doctrine of favourable interpretation; and that which is not to be ſupported of *Underwood* and *Morris* (*a*), and which was determined by Mr. Baron *Parker* ſitting for the Lord Chancellor. It does not appear by any report I have ſeen, to have been cloſely conſidered; it is contrary to the Canon and Civil law, and apparently unreaſonable, the reſtraint having been impoſed only till twenty-one, and the marriage contracted improvidently at ſixteen: I therefore agree with the late Lords Commiſſioners in denying the authority.

(*a*) 2 Atk. 184.

Sir *Dudley Rider* in arguing the caſe of *Harvey* and *Aſton*, expreſsly founds his argument on the perpetuation of the reſtraint.

And Dr. *Strahan* who argued on the ſame ſide, admits the qualification of time, place, and perſon, as given before.

The will before us contains a reſiduary bequeſt, but that has been repeatedly and well enough determined, to leave the conditional legacy in *ſtatu quo*; it only prevents that which has not been diſpoſed of already, whatever be its amount, from falling by order of law, to the executor or next of kin.

But the great vice of the argument in favour of the daughter lies here: It was not contended againſt the rules above mentioned, if the bequeſt had been to her at twenty-one, or twenty-five in caſe ſhe were then unmarried without more, that ſhe could have claimed the legacy at any other time, or in any other caſe: But, becauſe the mother was empowered to ac-

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celerate the gift by her conſent to a proper marriage, and a proper ſettlement; it was thence argued, that it was indirectly putting an illegal conſtraint upon marriage. Now if the firſt branch of the gift did not impoſe a direct reſtraint, in contradiction of law, the relaxation of that condition certainly would not operate as an indirect reſtraint of the ſame nature.

I am therefore of opinion, that the daughter having married at eighteen, improvidently ſo far as appears, and againſt the anxious prohibition of the mother, never came under the deſcription to which the gift of the 10,000 *l.* was attached.

It was therefore void, and a part of the reſidue; conſequently it belongs to the aſſignees of the mother the defendants; and the bill muſt be diſmiſſed, ſo far as it ſeeks to have that truſt executed.

When an executrix pledged bonds, ſpecifically bequeathed, for a debt contracted by her on her own account, after the teſtator's death, the pawnees were ordered to deliver them up for the benefit of the ſpecific legatee.

The ſecond point made by the plaintiff, goes to recover ſpecifically the 1000 *l.* bonds, ſecurities on the river *Lee*, out of the hands of *Hankey* and Co. the bankers, with whom they were pledged by the mother the executrix, to ſecure a private debt of her own.

This muſt proceed upon the ground of imputing fraud to the bankers, in concerting with the executrix a *devaſtavit*, and miſapplication of that part of the teſtator's effects, to diſappoint the ſpecific legatee.

The bonds were ſpecifically bequeathed to the executors in truſt, to receive the intereſt for the uſe of the infant till twenty-one, for her ſeparate uſe, notwithſtanding her coverture, and at twenty-one to transfer the principal and intereſt due thereon, to the daughter, for her own uſe and benefit.

The

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The teſtator died in 1776, leaving an ample ſufficiency to pay his debts; his executrix was therefore bound to aſſent to the ſpecific legacy.

Three years afterwards in 1779, the bankers took theſe effects, which they muſt know had been the teſtator's, from her, whom they alſo knew to be his executrix; not by purchaſe with money then advanced, not as a pledge for money then lent, but as a pledge for a debt contracted with them before, on her own account, and though the debt was contracted after ſhe became executrix, yet it was two years afterwards, and without any reference to the teſtator's affairs: The bonds, it is alſo admitted, were not aſſigned.

It is of great conſequence that no rules ſhould be laid down here, which may impede executors in their adminiſtration, or render their diſpoſition of the teſtator's effects unſafe, or uncertain to the purchaſer; his title is complete by ſale and delivery; what becomes of the price, is no concern of the purchaſer: This obſervation applies equally to mortgages and pledges, and even to the preſent inſtance, where aſſignable bonds were merely pledged, without aſſignment.

It applies alſo, where the tranſaction is with one of many executors, for each is competent.

But fraud and covin will vitiate any tranſaction, and turn it to a mere colour. If one concerts with an executor, or legatees, by obtaining the teſtator's effects at a nominal price, or at a fraudulent under value, or by applying the real value to the purchaſe of other ſubjects for his own behoof, or in extinguiſhing the private debt of the executor, or in any other man-

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ner, contrary to the duty of the office of executor; ſuch concert will involve the ſeeming purchaſer, or his pawnee, and make him liable for the full value.

Upon both grounds I think the defendants *Hankey* and Co. muſt deliver up the bonds, and account for the intereſt they have received upon them. The bonds as a ſpecific legacy were legally veſted in the executors, as truſtees for the plaintiffs, and the poſſeſſion of the *Hankeys* without aſſignment, gave them but a poſterior equity.

They were delivered as a ſecurity for the private debt of the executor; to which the *Hankeys* knew they were not liable, till all the debts, and legacies of the teſtator were ſatisfied.

Therefore let the plaintiff's bill ſtand diſmiſſed, ſo far as it ſeeks the execution of the truſt in the will of *Richard Kee* of the 10,000 *l.* South Sea annuities there mentioned.

Let the defendants *Hankey* and Co. bring the ten bonds on the river *Lee*, mentioned in the pleadings in this cauſe, into the Maſter's Office to be there depoſited, ſubject to the further order of the Court; and let them alſo account before the Maſter, for all intereſt they ſhall have received on the ſaid bonds, and pay the account thereof into the Bank, in the name of the Accountant General, in truſt in this cauſe, and ſubject to further order.

And let an account be taken alſo of what the ſaid executors, or any of them ſhall have received for intereſt, on the ſaid bonds on the river *Lee*, and alſo for the rents of the freehold houſes in *Denmark Court*.

And let the coſts of the plaintiffs and of the defendants the executors, except *Elizabeth Tyler*, be taxed; and let what ſhall be found due for ſuch coſts, and alſo on account of the intereſt of the ſaid bonds, be raiſed by ſale of ſo much of the 10,000 *l.* South Sea annuities, as will be ſufficient for that purpoſe: The ſaid coſts to be paid to the reſpective parties, and the ſaid intereſt to be paid into the Bank, in the name of the Accountant General, ſubject to further order.

And it being admitted, that the defendant *Elizabeth Tyler* alone received the rents of the ſaid freehold tenements, let an account be taken as againſt her, of what remains due thereon.

And let an account be taken of what remains due for the 100 *l.* bequeathed by the will of *James Cockburn*, and the intereſt thereon, from one year after his death.

And let an account be taken of what the ſaid *Samuel Scott* is indebted to the ſaid *Elizabeth Tyler*; and let the ſame be deducted from the amount of the account laſtly before directed; and let the plaintiff *Samuel Scott* be admitted a creditor for the balance, under the bankruptcy of the ſaid *Elizabeth Tyler*, and let ſuch ſum as he ſhall receive for a dividend thereon, be paid into the Bank, in the name of the Accountant General, in truſt in this cauſe, and ſubject to further order,

Refer it to the Maſter, to inquire what ſettlement the plaintiff *Samuel* hath made on the plaintiff *Margaret Chriſtiana*; and whether the ſame be competent and proper; and if he ſhall find that no ſuch ſettle-

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ment hath been already made, let him receive propoſals for ſuch a ſettlement.

And reſerve the conſideration, in what manner the ſaid freehold tenements in *Denmark Court*, ſhall be conveyed and aſſigned, and the ſeveral ſums above mentioned ſhall be paid out, till the Maſter hath made his report.

And reſerve the conſideration of ſubſequent coſts, and all other matters, till after the Maſter ſhall have made his report.

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15 Jan. 1789. Lord Thurlow C.

Hartly v. *Hobſon.*

All that is neceſſary on the affidavit to ground an application that an injunction may ſtay trial, is that the plaintiff cannot ſafely proceed to trial until the defendant hath put in his anſwer.

APPLICATION that the injunction granted in this cauſe might extend to ſtay trial: It was urged, that the affidavit ſhould be preciſe as to the diſcovery expected from the anſwer of the defendant. Upon being applied to, I ſaid, and his Lordſhip agreed, that the common language of an affidavit neceſſary on ſuch an application was, that the party was adviſed and believed, that he could not ſafely proceed to a trial, until the defendant had anſwered. The Court granted the order: but the caſe being very ſingular, his Lordſhip, upon revolving it, directed the order not to be delivered.

Betteſworth

Betteſworth v. *Betteſworth.*

11 Feb. 1789. Lord Thurlow C.

IN this caſe it was referred to the Maſter to enquire whether the plaintiff's late father had appointed a guardian for the plaintiff; and if not, that the Maſter ſhould approve of a proper perſon to be appointed guardian of the plaintiff the infant.

Farrar v. *Lewis.*

12 Feb. 1789. Lord Thurlow C. See 2 Bro. C. C. 640.

ON the 5th of *Feb.* 1789, the plaintiff applied upon the uſual affidavit, that the injunction granted in the cauſe might extend to ſtay trial: but Mr. *Mitford*, as an *amicus curiæ*, ſaying the affidavit ſhould be particular as to the diſcovery expected, it ſtood over, and I was deſired to lay before the Court ancient inſtances. It was moved again on the above day, the 12th of *February*, when *Say* v. *Mevel*, 11th *February* 1745; *Burdet* v. *Zuchers*, *Trinity* Term 1745, by Lord *Hardwicke*; and *Batteſlea* v. *Peach*, 29th *July* 1783, all expreſsly to the point, being produced, his Lordſhip ſaid, they only tended to confirm the opinion he had entertained, and granted the order.

Barclay v. *Ruſſell.*

23 Jan. 1789. Lord Thurlow C.

Application for an order to direct the Attorney General, as ſuch, to appear to the bill, refuſed.

MR. *Graham* moved, that the Attorney General, on behalf of the Crown, might be directed to appear to the plaintiff's bill. His Lordſhip aſked, if any

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any ſuch order could be recollected. The Attorney General, *quà* ſuch, was always ſuppoſed to be in Court. A plaintiff is entitled to juſtice; and if the Attorney General will not appear, it muſt be conſidered as a *nihil dicit.* Suppoſe I ſhould make an order, and he would not appear under it, can an attachment iſſue againſt him to enforce it? Certainly not. But there muſt be a period of time in which the cauſe ſhould be concluded: and his Lordſhip aſked, when the Attorney General, on behalf of the Crown, was a neceſſary defendant, whether he was ſerved with a ſubpœna; or how he was brought into Court?

Application refuſed.

18 June 1789. Lord Thurlow C.

Abel v. *Nodes.*

Exceptions having been filed, but not ſet down to be argued, not cauſe againſt confirming a report.

HIS Lordſhip, in this caſe, as in that of *Hall* v. *Mulliner*, ſupr. 604, held, that filing exceptions to a report, and not ſetting them down to be argued, is not cauſe againſt confirming the report abſolutely.

21 July 1789. Lord Thurlow C.

Smith v. *Hibbard.*

The vendor of a real eſtate dying before the contract entered into by him for the ſale was completed, his heir at law, an infant, declared to be a truſtee within the ſtat. of the 7th of queen Ann, and directed to convey.

WILLIAM Smith, being ſeiſed in fee of ſeveral eſtates, deviſed them to truſtees, to particular uſes; and after giving legacies, deviſed and bequeathd the reſidue of his eſtates, real and perſonal, to the plaintiff, and appointed him, and *Clark* and *Roberts*, acting executors. He afterwards contracted with *Hibbard*, deceaſed, for the ſale of one of the eſtates deviſed by his will; was paid 5 *l.* in part; and he delivered

delivered poſſeſſion of the eſtate to the purchaſer. Before the purchaſe was completed, both the vendor and purchaſer died. *Smith* the purchaſer left the defendant *Smith*, an infant, his heir at law. The purchaſer made his will, and deviſed all his real eſtate for the equal benefit of his children. He left two; a ſon, his heir at law, and a daughter, then and now infants. The plaintiff, as one of the executors, and the reſiduary deviſee, and legatee of *Smith* the vendor, brought his bill againſt his co-executors and the heir at law of *Smith*, an infant, and alſo againſt the deviſees and the executors of the purchaſer, to have the contract performed, and to be paid the reſidue of the purchaſe money either out of the perſonal eſtates of the purchaſer; or, if not ſufficient, to have it conſidered as a lien on the eſtate ſold.

The Lord Chancellor was clear, that until the money was paid, the contract could not be ſaid to be completed; and that though poſſeſſion was delivered, the money contracted to be paid would remain a ſpecific lien on the premiſes; and therefore ordered the contract to be carried into execution, and the purchaſe money to be paid by the executors of the purchaſer, out of his perſonal eſtate, in a courſe of adminiſtration: and if they did not admit aſſets to account, and if the perſonal eſtate ſhould not be ſufficient, his Lordſhip directed the deficiency to be raiſed by ſale or mortgage of the eſtate compriſed in the contract, or a ſufficient part of it; and on conſideration, declared the defendant *Smith*, the heir at law of *Smith*, the vendor, an infant, to be an infant truſtee, within the 7th of Queen *Ann*, entitled, "An act to enable infants to convey, &c." and directed him to convey to ſuch

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such perſons as the Maſter ſhould find entitled to have the conveyance; the will of the purchaſer not having been proved and eſtabliſhed againſt his heir at law.

Note. His Lordſhip would not direct the purchaſe money to be paid to the plaintiff as reſiduary legatee, but as the acting executor of his teſtator, liable to his debts and legacies.

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1 Auguſt 1789. Lord Thurlow C.

Price v. *Shaw.*

It is of courſe to except to a report, that an examination or depoſition is impertinent, without previouſly taking objections, as the Maſter doth not deliver a draft of ſuch reports.

AT the third Seal, Mr. Solicitor General applied, ſuppoſing it neceſſary, that the Maſter might receive objections to warrant exceptions to his report, that an examination referred to him was impertinent. A doubt ariſing as to the mode of proceeding, the motion ſtood over; and the Lord Chancellor having ſignified his pleaſure by Mr. *Leake*, that I ſhould make known to him what was the courſe of proceeding, I ſubmitted to his Lordſhip what occurred to me, of which the following is a copy:

If I am rightly informed, your Lordſhip ſeemed to think the Maſter's report, under ſuch a reference, was final. With the greateſt deference, I have ever underſtood that there is not any judgment, or opinion of a Maſter but may, if diſſatisfactory, be corrected by one of the following modes.

Where a report is under an order of reference for the Maſter to enquire and ſtate his opinion, whether an infant is a truſtee or mortgagee within the Statute 7th of Queen *Ann*, to approve of a guardian, make an allowance for maintenance, and the like; exceptions do not lie to ſuch reports, but the report is ſtated, and brought before the Court by petition; and the Court

Court will confirm, or vary it, according as it coincides in, or differs from the opinion of the Maſter.

When the Maſter by his report finds a fact, and his judgment is founded on evidence, he delivers a draft of his report before he ſigns it, that the parties may take objections; without which, unleſs by ſpecial order, they are precluded from excepting.

But where the reference is to ſee, whether an anſwer, examination, or depoſition is pertinent or impertinent, the Maſter's judgment is founded merely on his conception of the matter. Theſe reports are not confirmed: he iſſues no draft to ground objections; but the party takes exceptions to the report in the firſt inſtance.

Your Lordſhip ſeemed to think that exceptions do not lie to reports of the pertinence, or impertinence of an examination or depoſition.

In *Pinſent* v. *Pinſent*, 8th *Auguſt* 1747, 3 *Atk.* 557, Lord *Hardwicke* ſeems to go further back. There was a reference of depoſitions for impertinence: they were found to be ſo. Exceptions to the report. On argument, his Lordſhip did not quarrel with the exceptions, but doubted the propriety of the reference not being accompanied with ſcandal.

In *Phillips* v. *Muilman*, 6th *November* 1746, Lord *Hardwicke* referred an affidavit for impertinence.

And the referring of depoſitions is not novel: for by an order in *Iriſh* v. *Rook*, dated the 27th of *April* 1727, the depoſition of a witneſs was referred for impertinence. The Maſter, by his report, dated the 8th of *December* 1727, found it to be ſo. Exceptions were taken by the witneſs. Thoſe exceptions were argued the 8th of *Auguſt* 1728, *Reg. Lib. A.* fol. 537, and allowed.

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lowed. And, with ſubmiſſion, there ſeems to be great reaſon that reports under ſuch a reference ſhould be open to exceptions; for a penalty attends the finding, that is to ſay, coſts, the conſequential order, which is of courſe, being to expunge, and to tax the coſts of the reference, which are more or leſs, according to the length, and various parts of the examination, &c. referred, the pertinency or impertinency of which is conteſted.

On the 1ſt *Aug.* 1789, this matter was again brought on by petition, when his Lordſhip read the above in Court, ſaid he was wrong in the opinion he had entertained, and that the petitioner had of courſe a right to except to the report.

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5 March 1791. Lord Thurlow C.

Jeffery v. *Cameron.*

Anſwer, though ſaid to be falſe, muſt be taken to be true, until there be proof to the contrary.

ON ſhewing cauſe for continuing an injunction which had been granted, the defendant's anſwer was ſtated, by which he denied ſome facts ſtated, and charged in the bill: It was ſaid on behalf of the plaintiff, that the anſwer in that particular was not true. His Lordſhip ſaid the anſwer muſt be taken to be true, until there was proof to the contrary; but on paying the money into Court, the injunction was to be perpetual.

Motions

Motteux v. *Mackreth.*

6 May 1790.
Lord Thurlow C.

The name of a plaintiff cannot be ſtruck out of the bill, in order that he may be examined as a witneſs.

ON the 5th of *May*, the preceding day, application was made for liberty to amend the bill by ſtriking out one of the plaintiffs in order to make him a defendant, and to examine him as a witneſs. The Lord Chancellor having great doubts as to the propriety of the motion, ordered it to ſtand till this day for further information. It was accordingly ſubmitted to his Lordſhip to be a rule well known and eſtabliſhed, that after defendants have appeared, a bill cannot be amended by ſtriking out a plaintiff, without the tacit or expreſs conſent of the defendant; for which reaſon notice is required to be given of the motion, that the Court may hear whether the defendant's aſſent, or oppoſe it: for when a bill is filed in the names of ſeveral, all are jointly and ſeverally liable to coſts, and the plaintiff intended to be ſtruck out may be the only one of ability to anſwer coſts. The caſe of *Titterton* v. *Oſborn*, ſupr. 350, was ſubmitted to his Lordſhip, and it was further urged, that the ground of the preſent application was very different: it was avowedly with a view to examine the ſaid plaintiff to ſupport the bill; without which it might probably be unfounded, and diſmiſſed with coſts: and therefore, he being liable to coſts ſo long as he was a plaintiff, it could not be ſaid he was not intereſted. His Lordſhip denied the motion.

Pendleton

11 June 1790. Lord Thurlow C.

Pendleton v. *Mackrory.*

The Court, after doubting, granted an order to appoint a guardian of the plaintiff, the infant, on filing the bill, and before the defendant had appeared.

ON a motion the above day by Mr. *Lloyd*, on behalf of the plaintiff, to have a guardian aſſigned him, and for a receiver, his Lordſhip doubted the propriety of the application, as the defendants had not appeared; therefore notice could not be given of the motion. His Lordſhip, however, granted the motion as to the guardian, but directed me to think of it before the order was delivered.

In conſequence of which I ſubmitted to his Lordſhip, that the moment a bill is filed on behalf of an infant, ſuch infant becomes a ward of, and under the care of the Court: and I further ſubmitted, that if a guardian is not to be appointed until the defendants have appeared, ſuch infant may be five or ſix months without having one to take care of his perſon, or ſee to his education: for ſhould the defendants abſcond to avoid being ſerved with proceſs to appear, or being ſerved, ſhould refuſe to appear, the plaintiff will be under the neceſſity of purſuing the line preſcribed by the ſtatute of the 5th of *Geo.* 2. to render proceſs effectual againſt perſons who abſcond, before he can bring the defendants into Court. Upon the above obſervations being laid before his Lordſhip, his Lordſhip directed the order to be delivered.

Lowthian

Lowthian v. *Haſſel.*

23 July 1790. Lord Thurlow C.

ASSETS marſhalled to let in ſimple contract creditors and legatees upon legal aſſets, *pro tanto* as the ſpecialty creditors ſhall exhauſt of equitable aſſets.

Ex parte *Hodgſon.*

30 July 1790. Lord Thurlow C.

An infant, the ſurviving life in a biſhop's leaſe, not beneficially intereſted, held to be an infant truſtee, within the ſtat. of the 7th of queen Ann. Vid. infr. 749.

HODGSON was entitled to an eſtate held under a Biſhop's leaſe, determinable on the lives of *A.*, *B.*, and *C.* *C.* is the ſurvivor; and he being an infant, application was made that he might ſurrender the leaſe under the ſtatute of the 29th of *Geo.* 2. intituled, "An act to enable infants, lunaticks, or femes covert, to ſurrender a leaſe in order to obtain a new leaſe:" Or that he might ſurrender it under the Statute of the 7th of Queen *Ann*, intituled, "An act to enable infants who are ſeiſed or poſſeſſed of eſtates in fee, in truſt, or by way of mortgage, to make conveyances of ſuch eſtates, the infant not being beneficially intereſted, but his name only uſed in truſt." His Lordſhip was clear the infant came within the ſtatute of the 7th of Queen *Ann*, and ordered him to ſurrender the leaſe, in order that a new leaſe might be obtained.

[*Query.* If this be not going beyond the act; the act only putting the infant into the ſtate of an adult, and not ſaying for what purpoſe he ſhall convey. J. D.]

13 Nov. 1790.

Angerſtein v. *Clark.*

THE bill was by a bond creditor for an account of the aſſets of the teſtator, and to be paid a bond debt in which one *Cobb* was a ſurety with the teſtator. An objection was taken for want of parties, for that *Cobb* was not a party.

There were cited *Collins* v. *Griffith*, 2 *P. Wms.* 313; *Madocks* v. *Jackſon*, 3 *Atk.* 406.

Lord Chancellor.—If you ſue on a joint and ſeveral bond, I have always underſtood it was neceſſary to bring all before the Court to prevent circuity; but if the bill ſtates, and the defendant admits the co-obligor to be inſolvent, the objection ſeems to me to be removed: but that is not ſo in this caſe; therefore let the cauſe ſtand over, and amend.

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7 Dec. 1790. Lord Thurlow C. 2 Anſtruther's Rep. 458. in not. S. C.

Sellers v. *Dawſon.*

A plaintiff becomes a bankrupt: the bill cannot be diſmiſſed for want of proſecution, ſhould his aſſignees not think proper to file a bill in nature of a bill of reviver.

MR. *Abbot* moved the above day to diſcharge, for irregularity, an order to diſmiſs a bill for want of proſecution; the plaintiff having been, at the time of the order, found to be, and declared a bankrupt; which his Lordſhip was about to grant: but Mr. *Abbot* informing his Lordſhip that the Court of Exchequer had granted ſuch orders under ſuch circumſtances, and delivering ſome caſes to his Lordſhip, he ſuſpended making any order, and ſent the caſes to his Regiſter, and deſired to have his thoughts.

The following are the caſes:

Bramhall

Bramhall v. *Croſs*, Exchequer, *Hil.* 1790. Motion to diſmiſs a bill for want of proſecution, with coſts, which was granted, unleſs cauſe. The cauſe ſhewn againſt it was, that the plaintiff was a bankrupt. After filing the bill, and before it was diſmiſſible, the Court held it to be the rule that they did not give coſts againſt a bankrupt plaintiff; but afterwards took a diſtinction, whether the bill was filed on an equitable right, which veſted in the aſſignees, or was a mere frivolous bill, from which the aſſignees had no benefit. On a ſubſequent day Mr. *Abbot* ſhewed for cauſe, that he had looked into the bill, and found it was a ſuit to impeach the ſettlement of a partnerſhip account, and for an injunction to ſtay an action on a promiſſory note for part of the pretended balance; that he alſo ſtated the bankrupt was never certificated, and that he relied on the precedent of *Tait* v. *Carwick*, in Exchequer, 27th *June* 1786. (This was an injunction cauſe.) The defendant moved and obtained the ordinary order to diſmiſs the bill for want of proſecution, unleſs cauſe. On the 2d *July* following, it was moved to make the rule abſolute, which was enlarged until *Mich.* Term following, to give the party time to enquire whether the aſſignees of the plaintiff, who had been found a bankrupt, would revive the ſuit, (by which it is evident the Court conſidered the ſuit as abated). On the 14th of *November* 1786, cauſe was ſhewn as to ſo much of the order as directed the bill to be diſmiſſed with coſts; namely, that the plaintiff was a bankrupt, (and it might have been added, could not do any thing), and his aſſignees had abandoned the revival of the ſuit.

Seller v. *Dawſon.*

Caſes in the Exchequer.

Sellers v. *Dawſon.*

On reading an affidavit, the rule was made abſolute as to diſmiſſing the bill, *but without coſts.*

Mr. *Johnſon contra.*—This bill was filed only ten days before the plaintiff became bankrupt, and this is a caſe for ſhewing no favour to the plaintiff.

Mr. Baron *Thompſon* was for diſmiſſing the bill with coſts generally, and without regard to the particular circumſtances.

(Circumſtances, I ſhould think, are not to the purpoſe; for it is either within the rule of diſmiſſion, or it is not.)

The Chief Baron thought the circumſtances were ſuch as to entitle the plaintiff to favour; and on the general queſtion, he alſo doubted the propriety of the above caſe of *Tait* v. *Carwick*; and thought on a future caſe occurring of the ſame nature, it would be worth conſideration.

Qu. Can a bankrupt ſue, or be ſued, except for perſonal damages?

The bill was diſmiſſed with coſts.

Mr. *Abbot* alſo encloſed a note, that it ſeemed to have been the general principle as to bankrupts ſuing, or being ſued, that they ſhall pay coſts like other parties.

Vide Mr. *Mitford*'s manuſcript, entitled *Briefs*, ſect. 2. page 442—6. *March* 31, 1742.

The petition of *Berry*, in the matter of *Berry*, to be diſcharged from coſts, and his contempt for non-payment of a ſum of money ordered; the petition was diſmiſſed by Lord *Hardwicke*. (*Qu.* Was it not for this reaſon that the coſts were conſidered by his Lordſhip as part of the contemnor's puniſhment?)

See likewiſe *Smith* v. *Williamſon, et è contra.* In Mr. *Mitford*'s manuſcript briefs, ſect. 2. page 448-6. in Exchequer, *Mich.* 1746: a bankrupt was made to pay

pay coſts of ſuit brought againſt him before his bankruptcy. *Sellers* v. *Dawſon.*

It is to be preſumed the plaintiff revived againſt the aſſignees, in order to proceed in the cauſe to a hearing; for could they proceed without reviving?

Vide Ex parte *Sneap*, *March* 4, 1782. *Cook's Bankrupt Law*, 2d edit. fol. 236. the ſame point.

The Court probably gave coſts againſt the bankrupt that the plaintiff might be conſidered as a creditor for ſuch coſts on the bankrupt's eſtate.

Upon the above motion of Mr. *Abbot*, and the caſes and notes from Mr. *Mitford*'s manuſcript briefs, the Regiſter ſubmitted to his Lordſhip, that he had ever underſtood it to be an eſtabliſhed rule, that after a ſuit is abated by death, or otherwiſe, no ſtep can be taken in it, until it be revived.

That the bankruptcy of a plaintiff abated a ſuit, could not be doubted. There were motions almoſt every Term by which defendants admitted it: for inſtance, an injunction being under ſeal cannot be diſſolved but by order in open Court; and therefore when a ſuit was abated in which an injunction had iſſued, the injunction continued in force until the ſuit was revived, ſo that an application might be made to diſſolve it: for which reaſon, when an injunction hath been obtained, and the plaintiff hath become a bankrupt, and his aſſignees neglect to revive, the motion is of courſe, "that the aſſignees may file a "bill in nature of a bill of revivor, by a given day, "or the injunction be diſſolved."

If it were the practice to diſmiſs a bill ſo circumſtanced, for want of proſecution, why not add it to the ſame motion, and do it under the ſame order?

Sellers v. Dawſon.

What was the practice of the Court of Exchequer the Regiſter could not take upon him to ſay. As to the practice of the Court to which he long had the honour to belong, he could ſpeak; that, to his recollection, he never met with or heard of ſuch an inſtance, and was fully perſuaded there was not one. The principle, he before obſerved, recurring, that when a ſuit was dead, no ſtep could be taken in it until it was revived; and is abſurd to apply to diſmiſs what did not exiſt. And he ſubmitted; ſuppoſe a plaintiff, before he was found a bankrupt, had replied to the defendant's anſwer, notice muſt by the rules of the Court be given of the motion to diſmiſs: To whom? To the plaintiff, who was dead in law; or to his aſſignees, who were not in Court? Should the plaintiff be thought the proper perſon to ſerve, and he ſhould appear by Counſel, and ſay he was a bankrupt, could the Court put terms upon him to go to commiſſion; could they ſay as much to his aſſignees, who are not in Court? It is ſubmitted, the Court would not. It is believed, and with a decree of certainty, there is not an inſtance of either: therefore, to puniſh a man with coſts, for not doing what he cannot do, or for that which thoſe that can will not do, is, as it was ſubmitted, rather unreaſonable. Beſides, it is a known rule, that a party cannot revive for coſts only, unleſs they be taxed, and thereby become a duty: and to make a man revive a ſuit merely that the Court may have it in its power to direct him to pay coſts, is againſt all rule.

On the 18th of *December* 1790, Lord *Thurlow* referred the Regiſter to an anonymous caſe, in 1 *Atk.* octavo edit. fol. 263. in which Lord *Hardwicke* is made to ſay, "Bankruptcy is no abatement."

To

To which he anſwered his Lordſhip, he had looked into that caſe:

The title of it is: *Campion* v. *Tomkinſon* and *Johnſon*, 14th of *March* 1747. Upon the plaintiff's ſhewing exceptions for cauſe to continue the injunction which had been granted. The common order was made, to refer the exceptions, and the plaintiff to procure the report in four days.

On the 18th *March*, the anſwer was reported inſufficient.

On the 27th *April* 1748, the plaintiff obtained an order to amend, and for the defendant to anſwer the amendment, and exceptions at the ſame time.

The defendant having put in a further anſwer on the 3d of *November* 1748, obtained an order to diſſolve the injunction, unleſs cauſe.

On the 10th of *November* 1748, the date of the caſe in *Atkins*, the defendant applied to diſſolve the injunction abſolutely, and the plaintiff ſhewed his former exceptions for cauſe; when the defendant's ſecond anſwer was referred, and the plaintiff was to procure the report in four days.

On the 14th *November* 1748, the anſwer was reported ſufficient.

Upon looking into the Minute Book, the entry of the above orders and the ſaid report, it doth not appear that the plaintiff was a bankrupt: neither is there the leaſt note of what Mr. *Atkins* makes Lord *Hardwicke* to ſay, "that bankruptcy is no abatement." It being novel, I muſt confeſs it rather ſurpriſed me; for if ſuch were his Lordſhip's doctrine, and ſuch the practice, it is wonderful there ſhould have ſince been ſuch numberleſs applications that the aſſignees of a bankrupt

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might revive in a given time, or the injunction be diſſolved, for the purpoſe of giving the defendant an opportunity to apply to get rid of the injunction in form; from which it is evident, that until the ſuit be revived he cannot.

And it is to be obſerved, that all the applications and orders in the above anonymous caſe were entirely of courſe; ſo that there was no ground for Lord *Hardwicke*'s ſaying what he is made to ſay.

At the firſt Seal after *Chriſtmas* 1791, Mr. *Abbot* again renewed his motion, when Lord *Thurlow* ſaid, he had fully conſidered the matter; that he was perfectly ſatisfied the order to diſmiſs the bill in the ſtate it was (which the application went to diſcharge), was perfectly irregular: that the granting of the motion would, in effect, be giving exiſtence to that which was a nullity: It could not be enforced; and for that reaſon, and that only, he made no order.

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24 Jan 1791.

Queſtion, whether a peer who lived in the country, and was there at the time of being ſerved with a letter miſſive and a ſubpœna to appear to the plaintiff's bill, both houſes of parliament being at that time convened and aſſembled, ſhould be conſidered to be in town. Lord Chancellor was of opinion he was to be conſidered as being in town, but the matter was compromiſed.

Attorney General v. Earl of *Stamford.*

ON the 19th of *January* 1791, Mr. *Green* then attending as the Regiſter of the day, Mr. Solicitor General moved, that an order for a ſequeſtration *niſi*, againſt the defendant for not anſwering the plaintiff's bill, he having been ſerved with a ſubpœna, and the Lord Chancellor's letter miſſive, (both Houſes of Parliament having met), might be diſcharged for irregularity, the defendant's uſual reſidence being in the country, where he then was.

A doubt having ariſen, and his Lordſhip having ſignified his pleaſure by Mr. *Green*, that I ſhould make known to his Lordſhip my thoughts; I ſubmitted to him the following obſervations:

When

Attorney General v. Earl of *Stamford.*

When both Houſes of Parliament are aſſembled to diſpatch the weighty concerns, &c. purſuant to his Majeſty's proclamation for that purpoſe, it is to be preſumed the Members of each Houſe are in town, acting in diſcharge of their duty; and with great deference, the Statute of the 24th of *Geo.* 2. chap. 24. ſeems to confirm that preſumption, for by that act, after the Parliament is aſſembled, no proceeding could be had againſt any Lord in Parliament, &c. until fourteen days after the adjournment, prorogation, or diſſolution of ſuch Parliament: Upon this ground it is ſubmitted, that being preſumed to be in town, attending to the weighty concerns of the public, they could not attend to their private concerns; and it is obſervable, his Majeſty at the cloſe of a Seſſion, after apologiſing for keeping them ſo long aſſembled, and thanking them, concludes with recommending particularly to the Lords in Parliament, *preſuming all* are preſent, to encourage in their reſpective counties, induſtry, good order, &c.

The 24th of *January* 1791, the motion was renewed; a caſe in *Harriſon's Chancery Practice*, fol. 46. was cited. The Lord Chancellor, obſerved upon the above Statute of the 24th of *Geo.* 2. and ſaid, that if the defendant would take the benefit of the privilege to which he was entitled under that Act, it muſt be in the full extent, which preſumed he is in town attending his duty; and his Lordſhip would, from what I heard drop from him, have denied the motion; but it was compromiſed by the plaintiff's conſenting the defendant ſhould have a month's time to anſwer.

Webb

4 March 1791. Lord Thurlow C.

Webb v. *Webb.*

THIS was a petition of a party come of age, to have the funds, on which a legacy to him at twenty-one had been placed out, transferred to him; the funds at the time the legacy became payable, being of greater value than the legacy, a queſtion aroſe, whether he was entitled to more than barely his legacy?

Green v. *Pigot*, in 1 *Brown's Chan. Reports*, 103. was cited. The Lord Chancellor ſeemed to be of opinion, that a ſum of money paid into the Bank, to anſwer a contingent legacy, and then laid out in Bank annuities; and theſe annuities at the time the legacy became payable were of greater value; that as the legatee would have ſuſtained the loſs, had the funds fallen, he was entitled to the advantage (*a*).

(*a*) But ſee the contrary Alcock v. Eames, ſupr. 378, and Starkie v. Smith ſupr. 520.

Docker v. *Horner.*

11 May 1791. Lord Thurlow C.

BILL by creditors for payment of their debts out of the eſtates of *Thomas Dadly* deceaſed, the teſtator: Upon hearing the cauſe, the neceſſary accounts were directed, and the debts directed to be paid out of the perſonal, and real eſtate: The Maſter made his report; and the funds to pay the money reported due to the creditors being inſufficient, the Maſter was directed to apportion the ſame amongſt the creditors, and what he

Creditors or the legal repreſentatives of ſuch of them as were dead, were ordered to be paid the ſum reported due to them out of the funds in Court, and the Accountant General directed to draw on the Bank for the ſame: He iſſued drafts under provincial adminiſtrations to pay ſuch adminiſtrators: The Accountant General declining to ſign ſuch drafts, not thinking they authoriſed it, application was made that ſuch drafts might be iſſued; it ſtood over for conſideration, and on renewing the application, the Lord Chancellor was decidedly of opinion, ſuch adminiſtrations did not warrant the payment.

ſhould

ſhould ſo apportion, was to be paid to the creditors, or to the legal repreſentatives of ſuch of them as were dead; ſome of the creditors dying, provincial probates of their wills, or letters of adminiſtration were taken out: Under theſe provincial probates, or adminiſtrations, application was made to the Accountant General, to iſſue his drafts for payment of what was reported due to the deceaſed creditors; but the ſums exceeding the limit he had gone to, he refuſed to iſſue his drafts, but under Prerogative adminiſtrations: Upon this Mr. *Mansfield* on the 24th of *January* 1791, moved on their behalf, that they might be paid the ſums reported due to them, under ſuch provincial adminiſtrations: that the Accountant General drew for ſums to the extent of 30 *l.* under ſuch adminiſtrations, and why ſtop there? That the money reported due, did not much exceed that ſum; and the expence of taking out a prerogative adminiſtration, as the ſtamp duty was now ſo great, would exhauſt half the money.

Lord Chancellor.—Had the money been in the hands of a third perſon, could they under ſuch an adminiſtration have received it? Certainly not. Would their receipt be good? No. Suppoſe a Prerogative adminiſtration ſhould be granted to another, could not he inforce payment? There could not be a doubt. And is this Court to give ſanction to that which is not ſtrictly legal? And his Lordſhip being told that not one of the public commiſſaries would permit transfers, or pay dividends, but under Prerogative adminiſtrations, he denied the motion; but two or three orders made on ſimilar applications being produced, he ſaid he would conſider of it.

On

Docker v. *Horner.*

On the 11th of *May* 1791, Mr. *Mansfield* renewed the application; which his Lordſhip refuſed, for his former reaſons, with this further obſervation, that the ſmallneſs of the ſum made no difference; that if it were right, and the Court were warranted in ordering payment of money under provincial adminiſtrations, it might order payment, be the ſum ever ſo large; and therefore denied the motion.

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27 July 1791. Lord Thurlow C.

Attorney General at the relation of a lunatic, and the lunatic informant, and plaintiff.

AND

Panther, the committees of the lunatic, and the executors of her late huſband, and who had poſſeſſed her property given for her ſeparate uſe, under a deed executed in her lunacy, } Defendants.

Bill will lie by the Attorney General on behalf of a lunatic againſt her committees, for an account of and to ſecure the lunatic's property.

IT was at firſt doubted, but after a pauſe was held by the Court, that a bill might be brought by the Attorney General in behalf of a lunatic, againſt thoſe poſſeſſing the lunatic's property, and thoſe attempting to deprive him of it, for an account of, and to ſecure ſuch property for the lunatic; and an iſſue was directed to try whether ſhe was a lunatic at the time ſhe executed the appointment, under which the executors of the huſband claimed.

Ex

Ex parte *Swann.*

21 July 1791. Lord Thurlow C.

Maſter to enquire whether an infant was ſo within the Act of the 29th Geo. 2. and if he were, whether it was for his benefit to ſurrender old leaſes, and to take a new leaſe.

His Lordſhip having, on hearing the day preceding a petition under the Statute of 29th of *Geo.* 2. chap. 31. that an infant might ſurrender a biſhop's leaſe in order to renew it, and to have the fine paid; referred it to a Maſter to ſee upon what terms, the ſurrender and renewal ſhould be made, and to ſtate his opinion; it was ſubmitted the next day, whether the order made by his Lordſhip was not premature; by the preamble of the act, it was clear the Legiſlature meant it ſhould apply to ſuch only as were beneficially intereſted; the words (after taking notice that it was ſometimes neceſſary to ſurrender old leaſes in order to renew), are, 'but by reaſon of their being 'infant, lunatic, or feme covert, it could not be done 'to the *manifeſt prejudice* of them and their families,' the act then goes on to enact.

The matter being brought on in a ſummary way the Court will *not* take upon itſelf to determine what *their intereſt* is, but from the firſt, made the following order: Refer it to the Maſter to enquire and ſtate, whether *J. S.* is an infant within the intent and meaning of the ſaid Act of Parliament; and if ſo, whether it will be for the benefit of the ſaid *J. S.* to ſurrender the old leaſe, and to renew it.

Should the Maſter find the party comes within the act, the next order is to confirm the report, and to direct him to ſurrender, and to give directions concerning the fine.

Such

Ex parte *Swann.*

Such references it was ſubmitted to his Lordſhip were neceſſary; for ſhould the infant be found not to be beneficially intereſted, but to be a mere naked truſtee, this Court will conſider him as coming within the Statute of 7th of Queen *Ann*, entitled, 'An Act to enable infant truſtees, &c. to convey,' and ſo his Lordſhip was decidedly of opinion in Ex parte *Hodgſon*, 30th *July* 1790 (*a*); the petition was in the alternative, that the infant might ſurrender under the above Statute of the 29th of *Geo.* 2. or the Statute of the 7th of Queen *Ann*. His Lordſhip directed the latter.

(*a*) Supr. 737.

The Lord Chancellor upon coming into Court this day (*b*), directed the common order to iſſue.

(*b*) 29 July 1791.

Sandford v. *Paul.*

13 Dec. 1791. Lord Thurlow C.

A witneſs whoſe evidence had been rejected at the hearing under particular circumſtances, examined again before the Maſter, after the decree, but the Maſter to ſettle the interrogatories.

At the hearing of the cauſe, the depoſition of one of the witneſſes, (who was a creditor of two partners bankrupts, under a ſeparate as well as a joint commiſſion, but who had executed and delivered a releaſe of his debt only under the ſeparate commiſſion), upon being offered to be read, was objected to, and the objection allowed; and the Court referred it to the Maſter, to make the inquiry, by the order directed, and the parties were to be examined.

In the courſe of the enquiry, the above witneſs was tendered to the Maſter, having ſince the hearing, executed, and delivered a complete releaſe of his demand; this being objected to by the other ſide, it occaſioned the

the preſent application to the Court for the purpoſe; which his Lordſhip ordered, without any terms, or reſtriction; but before the Court roſe, his Lordſhip directed me to look into the caſes which had been cited, and to lay before him ſuch as I knew of, with my thoughts.

In obedience to his Lordſhip's commands, the following was ſubmitted to his Lordſhip:

The queſtion before the Court is, whether a witneſs examined in chief, whoſe depoſition was not admitted to be read at the hearing, and which conſequently cannot be read before a Maſter, can be re-examined before the Maſter to the ſame matter?

The plaintiff aſſerting it is of courſe, having obtained an order for the purpoſe; the defendant inſiſting, that a witneſs after publication, cannot be re-examined to matters to which he hath before been examined; each ſide relying on the caſe of *Sawyer* v. *Bowyer*, 1 *Brown's Chancery Reports*, 388, which will be more fully mentioned in it's courſe: It is not however, accurately reported in that book.

To form a true opinion of the queſtion, it may not be improper, to ſee what hath been the habit of the Court, in ancient and modern times.

In *Keilwey*, 96, *Mich.* 22 *H.* 7th, 1512, it was agreed clearly in Chancery, that new proofs may be examined after publication, which are merely ſupplemental to former proofs, as to add the *cauſa ſcientiæ*.

Ibidem, 100, 23 *Henry* 7, 1513: Exceptions to a depoſition ſhould be taken before publication, or the

Sandford v. Paul. the time is loſt; the party ſhall not chuſe whether he like the depoſition, or not.

Langham v. *Lawrence*, 13 *Car.* 2, 1661, *Hardres* 180: After trial at law directed in a former cauſe, the ſame plaintiff exhibited a new bill, to diſcover deeds; demurrer, becauſe it was to get new evidence after the firſt examination; the demurrer was overruled, for it did not call for ſupplemental proof, or contradict any teſtimony on oath.

Randal v. *Richford*, *Trin.* 15 *Car.* 2, 1663, 1 *Chan. Caſes* 25: A witneſs having ſworn that he was ſurpriſed, and had miſtaken in his examination, on commiſſion, a ſpecial commiſſion iſſued to re-examine that witneſs; but upon conſultation with the Maſter of the Rolls, and the Six Clerks, it was ſuppreſſed as contrary to the courſe of the Court.

The City of *London* v. Earl of *Dorſet*, 26 *Car.* 2, *May* 30, 1674, *Chancery Caſes*, 228: Upon a commiſſion for charitable uſes, a trial at law was directed, when a witneſs eighty years old, and unable to travel was diſcovered; and notwithſtanding the rule of publication, a commiſſion was obtained to examine him.

Lord Keeper.—The rule of *non* examining after publication, hath been ſtrict in this point, but the Court is to judge, and the examiners by commiſſion are miniſterial to the Court.

Inglet v. *Inglet*, *Eaſter*, 28 *Car.* 2, 1678, 2 *Chancery Caſes*, 217: Witneſſes ſpeaking uncertainly, on their firſt examination, ſhall not be re-examined. And Lord *Hardwicke* in *Cowſlad* v. *Corniſh*, 2 *Veſ.* 270, ſays, if a witneſs be once examined, it might be dangerous to let him be examined again; and the danger is, of drawing in a witneſs after it is known, what he hath already ſworn to.

In 2 *Chancery Caſes* 79, *Mich.* 33 *Car.* 2, 1681: The Maſter examined one witneſs three times, in a matter of account; his depoſitions were ſuppreſſed. *Sandford v. Paul.*

Callow v. *Mime*, 2 *Vern.* 472, *Mich.* 1781: An intereſted witneſs had been examined in the cauſe; afterwards he releaſed, and was re-examined; objection to reading his depoſition, for that he was engaged by his firſt examination to abide by what he had ſworn; overruled.

Lord *Thurlow* upon this remarked, 'it ſeems a better objection, that after ſeeing the firſt examination, 'the party might get him to amend his teſtimony.'

Tendering a written depoſition to a witneſs is good cauſe for ſuppreſſing it.

So where a witneſs delivers ſuch a written depoſition to the examiner.

And his Lordſhip further obſerved, that regularly no new witneſſes are to be examined after the hearing; but the Court began to do it in ſpecial caſes; and afterwards on the Maſter's certificate only.

In *Spence* v. *Allen*, *Trin.* 4 *Geo.* 1, 1718, *Gilbert* 150, *Prec. in Chancery*, 493. depoſitions had been ſuppreſſed, becauſe the interrogatories were leading, and publication paſſed: Upon looking into the interrogatories, the leading ſeemed to have been by inadvertency, and the evidence material to ſubſtantiate juſtice: Whereupon the Court ordered new interrogatories to be prepared by the Maſter; a precedent was produced for the ſame purpoſe, and the motion was, that a new ſet of interrogatories might be prepared by the Maſter.

Sandford v. Paul.

And Lord *Talbot* in *Arundel* v. *Pitt*, ſaid, the permitting of a witneſs to be re-examined, whoſe depoſition had been ſuppreſſed, depended upon circumſtances.

And Lord *Hardwicke* in *Bromley* v. *Child*, 28th *May* 1747, ſaid, that new interrogatories might be exhibited upon ſpecial circumſtances, but not of courſe.

In *Browning* v. *Barton*, 28th *July* 1774, Lord *Bathurſt*, after having conſulted Sir *Thomas Sewel* M.R., gave liberty to examine witneſſes before the Maſter, who had been examined previous to the hearing, but added, they were not to be examined to any matters to which before they had been examined; and the Maſter was to ſettle the interrogatories.

Upon the above caſes it was ſubmitted, that it was clear the Court had leaned againſt the re-examination of witneſſes, and that if ſuch re-examination was granted, it was under pointed reſtrictions; and as to what was inſiſted, that the application was of courſe, it is ſubmitted, that if the Court is not to exerciſe it's diſcretion, why is the application required to be ſpecial, and to be upon notice? And that it is not of courſe, your Lordſhip, and your Lordſhip's predeceſſors have determined.

To the paper of which the above is a copy, Lord *Thurlow* added the caſe of *Dudds* v. *Billing*, *Bunbury*, 24: obſerving that a witneſs cannot be examined to the ſame matter to which he hath before been examined; and put this queſtion: Suppoſe witneſſes had been examined on commiſſion, without order, and the depoſition ſuppreſſed, the party ought not to have the advantage of ſeeing their evidence to form the re-examination?

In

Sandford v. *Paul*

In *Practical Regiſter*, 220, it is ſaid, the interrogatories are to be ſigned by Counſel.

And ſo it is expreſsly ordered by rule of Court dated 29th of *April* 1687: This is confirmed, and directed to be obſerved by a ſubſequent order of Court, dated the 15th of *July* 1700, and entered in the Regiſter's Book.

On the 13th of *December* 1791, Lord *Thurlow* ſent for me, and delivered back to me the paper, which had been ſubmitted to him, with his annotations, and directed me to deliver the order, prefacing it, under the circumſtances of the caſe; and adding that the Maſter ſhould ſettle the interrogatories.

Edwards v. *Edwards.*

19 Jan. 1792. Lord Thurlow C.

ON the 16th of *January* 1792, Mr. *Simeon* moved upon notice, that an injunction which had been diſſolved, might on the bill which had ſince been amended, be revived, upon the ground, that the defendant had craved a commiſſion to take his anſwer. It was oppoſed by Mr. *Richards* for the defendant, who inſiſted that the amended bill was a mere repetition of the original, and that it was fully anſwered by his anſwer to the original bill: A doubt ariſing in regard to the practice, it was ordered to ſtand over to this day, and the Regiſter was to lay his thoughts before his Lordſhip in the mean time.

If after an injunction is diſſolved, the plaintiff amends his bill and requires a further anſwer, and the defendant prays a *dedimus* to take his anſwer; the Court will conſider it as dilatory, and will revive the injunction, but it muſt be upon notice, and a ſpecial application.

What follows was ſubmitted to his Lordſhip:

The order granting an injunction, runs, 'until the 'defendant ſhall fully anſwer the plaintiff's bill, &c.'

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If the defendant hath not anſwered, or having anſwered, his anſwer is reported inſufficient, or on exceptions, he ſubmits to anſwer, and the plaintiff amends his bill, it is one record; and the defendant muſt anſwer both; this is manifeſt by an order which is almoſt daily, 'for liberty to amend, and that the 'defendant may anſwer the amendments, and except-'tions at the ſame time.'

Should the plaintiff amend his bill after the anſwer is filed, the injunction is of courſe gone; for by the amendment he admits the anſwer to be full, and he cannot except; the injunction may likewiſe be diſſolved upon the merits.

This however doth not preclude a plaintiff from applying to revive the injunction, on amending his bill.

Whether the application need be ſpecial, it is humbly ſubmitted, depends upon circumſtances.

The bill being amended and an anſwer required, it is not for a defendant to ſay, that the bill is impertinent, or that it is a mere repetition of the original bill, (if it be, he may refer it for impertinence), nor ſhall he ſay that his anſwer to the original bill, is a full anſwer to the amended bill; he muſt anſwer, and it is for the Court to determine, whether it be ſufficient; if it be, the application to revive the injunction, muſt, it is ſubmitted, be ſpecial, and upon the merits, and if granted, will be *until the hearing* of the cauſe, or further order.

But if the defendant will be in contempt for want of his anſwer, or will pray time to anſwer, the Court will not let him derive benefit from his dilatorineſs, but

but will, it is submitted, revive the injunction, on an application of course, and by the order granting it, it will be until the defendant shall fully answer the plaintiff's bill, and this Court make other order to the contrary: And so it was laid down by Lord *Hardwicke* in *Bagster* v. *Walker*, 14th *March* 1746(*a*): An injunction had been dissolved on the merits; the plaintiff amended his bill, and the defendant having prayed time to answer, the plaintiff gave notice, and moved specially, to revive the injunction: After hearing Counsel on both sides, his Lordship said, 'that until the equity of 'the bill was denied, it must be taken as granted, that 'the plaintiff hath equity; that had the defendant put 'in his answer, the Court could have decided on the 'merits; that it was owing to the defendant's own 'laches that it was not; that a plaintiff was not by 'designed laches to be prevented from reviving the in-'junction; that the *giving of notice* of the application 'to revive under such circumstances *was not necessary:* 'it was of *course*; that the injunction when revived, 'would be as the original was, only until the defend-'ant should fully answer; and when he had answered, 'he might apply to dissolve it.'

(*a*) Supt. 109.

Lord *Hardwicke* in *Travers* v. Lord *Stafford*, 2 *Ves.* 19, which appears to be a very complex case, and to turn upon circumstances, is made to express himself very differently from what he said in the preceding case, that it was irregular to apply as of course to revive an injunction, on the defendant's applying for time to answer the amended bill; which, it is submitted, strongly implies, that his idea was, that a special application on notice, might be made for the purpose.

Edwards v. *Edwards.*

The application was renewed this day, the 19th of *January* 1792, when Mr. *Richards* for the defendant cited the above caſe of *Travers* v. Lord *Stafford*, and inſiſted that the plaintiff, to ground ſuch an application, ought to make an affidavit of his caſe; and cited alſo an anonymous caſe in 3 *Atkins* 694, in which Lord *Hardwicke* is made to lay it down as a rule ſettled, that until an anſwer to an amended bill is put in, a plaintiff cannot apply to revive an injunction; that it cannot be upon a defendant's praying a *dedimus*.

So that a defendant knowing this, may obtain thirteen weeks to anſwer, then put in any anſwer, which being inſufficient, he may get ten weeks more, and after that, run through all the proceſs of contempt, and by that means obtain the full effect of his action at law: If ſuch were the rule, it certainly would be againſt common ſenſe, and common juſtice: but his Lordſhip ſeemed to be clear, and adopted the idea of Lord *Hardwicke* in the caſe before ſtated of *Bagster* v. *Walker*, that a defendant ſhould not derive an advantage from his own laches, and conſidered his praying a *dedimus* as a dilatory; and therefore revived the injunction until anſwer and further order; he held that notice was proper to be given of ſuch a motion, but that an affidavit by the plaintiff of his caſe was not neceſſary.

Pye v. *Daubuz.*

24 May 1792.

A man borrows money and pledges the title deed of his eſtate, and promiſes to execute a mortgage, but doth not, and becomes a bankrupt, his aſſignees were ordered to pay what due, and if they did not, to convey the eſtate to the plaintiff in fee.

THE queſtion in this cauſe aroſe on the following caſe: The bankrupt before he became ſuch, borrowed money of the plaintiff, and lodged the title deeds of his eſtate in the plaintiff's hands, and promiſed to execute a mortgage, but did not, and became a bankrupt, and his eſtate and effects being duly aſſigned to his aſſignees, the plaintiff filed his bill to be paid the money due to him on his pledge, and if not, that they might convey the eſtate to him, and be foreclоſed; and ſtated, that not having the legal eſtate, he could not bring an ejectment.

Mr. Solicitor General cited *Beck* on demiſe of *Hawkins* v. *Welch*, *Wilſon* 276.

Lord Chancellor. — An agreement to make a mortgage will bind as if it were actually made: but I will conſider of it.

And on the 24th of *May* 1792, he directed an account of what was due to the plaintiff for principal, intereſt, and coſts; and the defendants the aſſignees to pay, and if they did not, they were to convey the eſtate to the plaintiff, and to be foreclоſed.

Thomas Ellis and *Suſanna* his wife, Plaintiffs.
Michael Atkinſon and another, Defendants.

24 May 1792. Lord Thurlow C.

The queſtion was, whether a feme covert having a power of appointing property veſted in truſtees by her marriage ſettlement, and to which the baron was a party, muſt appoint from time to time, or might aſſign her whole intereſt? held ſhe might.

ON the marriage of the plaintiffs, 2000 *l.* a moiety of 4000 *l.* and a mortgage for ſecuring ſuch moiety and the intereſt, were by indentures of ſettlement,

Ellis et ux. v. *Atkinſon* et al.

dated the 7th and 8th of *February* 1786, aſſigned to, and veſted in the defendants in truſt, to pay the intereſt to ariſe from time to time on the ſaid 2000 *l.* to ſuch perſon, and for ſuch purpoſes, as the plaintiff the wife ſhould by writing under her hand, atteſted as thereby required, appoint, to the intent the ſame might be for her ſole and ſeparate uſe, notwithſtanding her coverture, and her receipt to be a diſcharge; if ſhe ſurvived her huſband, the ſame was to be immediately paid to her; if her huſband ſurvived, the ſame was to go immediately upon her death, as ſhe by deed or will, executed and atteſted as preſcribed, ſhould appoint.

The plaintiff *Suſanna* by deed poll, dated the firſt day of *December* 1788, executed and atteſted as required, appointed, and ordered the ſaid 2000 *l.* and intereſt to be paid to the plaintiff her huſband.

Under that deed poll, the bill is filed to have the ſaid 2000 *l.* and intereſt paid according to the ſaid appointment.

Upon this a queſtion aroſe, and was ſtrongly argued, whether a feme covert having a power of appointing *the intereſt of her ſeparate eſtate, ſettled* for her ſeparate uſe, to protect her againſt the debts of her huſband, and to which ſettlement the huſband was a party, and had bound himſelf to the terms, and in conſideration of which, he had received 2000 *l.* part of her portion, muſt appoint from time to time; or could by deed aſſign the whole of her intereſt.

The caſes cited were, *Peacock* v. *Monk*, 2 *Veſ.* 190; *Norton* v. *Turvil*, 2 *P. Wms.* 144; *Grigby* v. *Cox*, 1 *Veſ.* 517; *Thayer* v. *Gould*, cited in the preceding caſe; *Hulme* v. *Tenant*, 1 *Brown's Chancery Reports*, 16; *Pearſon* v. *Brereton*,

Brereton, 3 *Atk.* 71; *Clarke* v. *Piſter*, 25th *March* 1778 (*a*).

Ellis et ux. v. *Atkinſon* et al.

(*a*) See 2 Veſ. jun. 494.

Lord *Thurlow* was much preſſed with the argument that by the ſettlement, the huſband was to have, and had received 2000 *l.* part of his wife's fortune; the wife was to have the other 2000 *l.* for her ſeparate uſe, and to guard or protect her againſt any thing that might befal her huſband; and by executing the ſettlement, and receiving the 2000 *l.* under it, the conſideration for his executing it, he had bound himſelf to the terms.

The cauſe was in hearing, the 23d of *May*, and 26th and 27th of *June* 1789, and ſtood over for conſideration: And after conſideration, his Lordſhip thought as the 2000 *l.* was in the abſolute power of the wife, and no appointment intended for children, or other purpoſes; and as it was evidently her pleaſure to give it to her huſband, he did not ſee how he could prevent her. His Lordſhip therefore, on the 24th of *May* 1792, decreed the defendants, the truſtees, to aſſign the 2000 *l.* to the plaintiff the huſband, after retaining their coſts.

Davidſon v. *Ruſſel.*

24 May 1792.

A deed obtained by fraud is bad *in toto*, though innocent perſons are intereſted under it.

THIS cauſe had ſtood over upon a doubt, whether a deed could be ſet aſide in part for fraud, and the reſt eſtabliſhed: Lord *Thurlow* was decidedly of opinion it could not, and in his note directing the contract to be ſet aſide, and the order drawn accordingly, ſaid there could be no heſitation.

This cauſe reheard, and affirmed by Lord *Loughborough* C., *Hilary* 1794.

In

Hilary or Eaſter Term 1792. Lord Thurlow C. 1 Veſ. junr. 453, S. C. 3 Bro. C. C. 510, S. C.

Where timber is cut down from off a lunatic's eſtate, becauſe in a periſhing ſtate, and for the benefit of the reſt, under a reference and order of the Court; Lord Thurlow ſeemed to think upon a queſtion, between the heir and perſonal repreſentative, that under ſuch circumſtances, the money raiſed was perſonalty; but recommended a bill to have a ſolemn judgment.

In the matter of *Bromfield*, a lunatic.

THERE being a conſiderable quantity of timber on the eſtate of the lunatic, in a periſhing ſtate, and proper to be cut down, the ſame was cut down and ſold, under an order of the Lord Chancellor, and the money paid into the Bank of *England*, with the privity of the Accountant General of the Court of Chancery, and placed to the credit of the ſaid matter, and to the account of the ſaid lunatic.

The lunatic afterwards dying, the heir at law applied by petition to have the money ſo raiſed by ſale of the timber paid to him, being ſtill to be conſidered, as it was argued by his Counſel, as part of the real eſtate of the ſaid lunatic, and deſcended with the other eſtates to the petitioner, as his heir at law.

On behalf of the next of kin, Mr. Solicitor General took this diſtinction, that as it was *cut down under order* of the Court, it was ſevered from the eſtate, and became the perſonal property of the lunatic. But ſuppoſe the timber on a lunatic's eſtate was not in a periſhing ſtate, and the annual rents of the eſtate not ſufficient to ſupport him comfortably, can it be imagined the Court would let a lunatic live without ſufficient accommodations, when a fund could be raiſed from the timber on it to procure them for him? It can hardly be doubted, but that the Court would take ſuch a ſtep.

In anſwer to which, Mr. *Mitford*, of Counſel for the heir at law, obſerved: That ſuppoſing a lunatic ſo circumſtanced as was put by the Solicitor General, it was to be preſumed, the Court would, as it ought, do every thing that would tend to the immediate con-

venience and comfort of the lunatic: But could it go further, would it do what the lunatic could not, make a will for him and diſpoſe of his property? And yet, the taking of any ſtep to alter the nature of his property, ſo as to make it go contrary to what it otherwiſe would, would in effect be doing what he could not do, make a will. Several caſes were cited.

In the matter of *Bromfield.*

It ſtood over for two or three days, and in the interim, I laid before his Lordſhip the two preceding caſes of *Audley* v. *Audley* (*a*), and *Gibſon* v. *Scudamore* (*b*); and likewiſe the judgment of Sir *Thomas Clarke* M. R. in *Tullet* v. *Tullet* (*c*); in which caſe, the mother, the *teſtamentary guardian* of an infant, cut down and ſold timber from off his eſtate; upon a bill filed by the heir at law, his Honour declared the money was to be conſidered as real eſtate, and belonging to the heir at law. And I likewiſe ſubmitted, that the former deciſions were upon bills filed by the purpoſe, on which the matters, and upon proper evidence, might be entered into, and the *order made appealed.* Upon the matter coming on again, the Lord Chancellor was of opinion, that the timber being cut down by order of the Court, and for the convenience of the lunatic it was ſevered, and became his perſonal property, and diſmiſſed the petition; but at the ſame time recommended it to the petitioner to bring the matter before the Court by bill, when it would be ſolemnly determined.

(*a*) 2 Vern. 192. and ſupr. 16.
(*b*) 2 Eq. Ca. Abr. 773. and ſupr. 45.
(*c*) Ambl. 370. and ſupr. 322.

Qu. Though the Court will, for the *immediate* convenience and comfort of a *lunatic*, order timber to be cut down and ſold to raiſe a fund for *that* purpoſe, and that only; there does not ſeem to be any reaſon, when *that* purpoſe is anſwered, that the next of kin ſhould be benefited by ſuch a ſtep, at the expence of the heir at law, who is always favoured. J. D.

Elcock

5 July 1792.

Elcock v. *Clegg.*

An infant having a day to ſhew cauſe againſt a decree of foreclosure, after he attained twenty-one; having attained, and having left the kingdom before he was ſerved to avoid his creditors. Application to ſerve his Clerk in Court with the ſubpœna; but Lord Thurlow thought it muſt be perſonal ſervice; but being again moved, upon a ſtrong affidavit, it was granted.

(*a*) Supr. 65.

A COMMON decree of foreclosure had been pronounced againſt the defendant, then an infant, with the uſual proviſo, that the decree was to be binding, unleſs the infant, upon attaining the age of twenty-one years, being ſerved with a ſubpœna to ſhew cauſe againſt the ſame, ſhould within ſix months after he attained ſuch age, ſhew good cauſe to the contrary; the *only* cauſe an infant can ſhew, as was laid down by Lord *Talbot*, in *Mallock* v. *Galton*, 3 *P. Wms.* 352 (*a*), is *error*. The infant attained his age of twenty-one years in *November* laſt, and having left the kingdom, as it was ſuppoſed, never to return, before he was ſerved with a ſubpœna to ſhew cauſe againſt the decree; Mr. *Stanley* appriſed me of his intention to move that ſervice of ſuch ſubpœna on his Clerk in Court, ſhould be good ſervice. The application being quite novel, I made Lord *Thurlow* acquainted with it, and ſubmitted to him, as he deſired, my thoughts as follow:

The infant, though foreclosed, unleſs the decree were made abſolute, was not bound; it was always open to the cauſe he could ſhew, and the plaintiff could not make a title; and the late infant having left the kingdom, ſo that he could not be ſerved perſonally with a ſubpœna to ſhew cauſe againſt it, and having no place of reſidence whereat to leave the ſubpœna, led the plaintiff to make the application. By Lord *Clarendon*'s rules, under title *Subpœna*, every ſubpœna to anſwer or revive, review, rejoin, or teſtify, is to be ſerved *perſonally*, or left at the defendant's dwelling-houſe or place of reſidence with one of

of the family. But although ſuch be the rule, yet the Court hath been in the habit, (upon a full affidavit that the defendant abſconds to avoid being ſerved), to allow ſervice on the defendant's Clerk in Court, of a ſubpœna to hear judgment, to be good ſervice; it is therefore to be preſumed, if the Court will allow ſuch ſervice of a ſubpœna to hear the judgment, it will allow the ſame ſervice to effectuate the judgment. On the 3d of *March* 1792, Mr. *Stanley* for the plaintiff, moved as above; but Lord *Thurlow* thought the ſervice of the ſubpœna muſt be perſonal, or that it ſhould be fully proved that he had left the kingdom, or had abſconded to avoid the ſervice. An affidavit having been made, that the defendant was greatly indebted to divers perſons, and that he had declared it was his intention to leave the kingdom, to avoid his creditors, on Mr. *Stanley*'s renewing the application this day, 5th *July* 1792, the Lords Commiſſioners, with out the leaſt heſitation, granted the motion.

Elcock v. *Clegg.*

Squirrel v. *Squirrel.*

16 Jan. 1792. Lord Thurlow C.

This Court will not make a *prochein amy* in indigent circumſtances give ſecurity to anſwer coſts.

At the fourth Seal before laſt *Chriſtmas*, it was moved by Mr. *Abbot*, that a *prochein amy* might give ſecurity to anſwer coſts; not for that he had ſince filing the bill left the kingdom, to reſide out of the juriſdiction of the Court; but for that he was in indigent circumſtances, and the defendant might loſe his coſts, ſhould coſts be awarded him. The Lord Chancellor being ſtruck with the novelty of the application, ordered it to ſtand over, and to be renewed this day,

Squirrel v. *Squirrel.*

and wiſhed me to let him know my thoughts, and if I recollected an inſtance of ſuch an application: The following thoughts were ſubmitted to his Lordſhip:

To lay it down as a principle, that no one in indigent or narrow circumſtances, unleſs he can qualify himſelf to ſue as a pauper, by ſwearing he is not worth *five pounds*, the matter in queſtion excepted, ſhall be permitted to ſue for any claim he may have, until he give ſecurity to anſwer coſts, (which, being a poor perſon, he may not be able to procure,) would in effect be putting a negative upon his claim unheard. Suppoſe an infant, three or four years of age, whoſe parents and relations are in low circumſtances verging on indigence, becomes entitled to real and perſonal property, which is withheld from him, and the perſon withholding it is committing waſte, by cutting down timber, &c. and a bill ſhould be thought adviſeable for an account, and for an injunction; if he is to ſtay until he attain twenty-one, before he is relieved, becauſe no one of property will adopt his cauſe; and his father, who is the moſt proper perſon to be his *prochein amy*, by reaſon of his circumſtances cannot be ſo, without giving ſecurity to anſwer coſts, which he is not able to procure, the eſtate may in the interim be ruined, and the infant's property waſted: Were this to be the rule, infants, who cannot ſue as paupers, would be in a worſe ſituation than real paupers. This Court will not ſuffer a defendant to be haraſſed by two bills for the ſame purpoſe; ſo likewiſe, if two bills are filed on the behalf of and in the name of an infant, the Court will ſtop that ſuit, which upon reference ſhall be found leaſt for his benefit to proſecute: but I do not believe there is an inſtance

inſtance of a reference to ſee if a bill is proper to be filed on behalf of an infant, to ſecure his property, and for the Maſter to conſider *who* is a proper perſon to be his *prochein amy*. Any perſon, as it is ſaid in the caſe of *Eyre* v. Counteſs of *Shafteſbury*, 2 *P. Wms.* 102, and ſo it is generally underſtood, may file a bill in the name of an infant for an account, &c., but he does it at his peril; and as to what was ſaid (as I am informed) by the gentleman who made the application, that it was analogous to one that is almoſt daily made, for a plaintiff to give ſecurity to anſwer coſts, it is, with ſubmiſſion, not in the leaſt ſo: The order that directs ſecurity to be given, ſtates the plaintiff to live out of the juriſdiction of the Court, conſequently the Court cannot enforce a duty; but in the Caſe before your Lordſhip, it is not ſuggeſted the *prochein amy* is out of the reach of the proceſs of the Court, therefore the defendant hath a double remedy; he may attach and hold his perſon, and ſequeſter what property he may poſſeſs; the former to anſwer the contempt, the latter *ad ſatisfaciendum*. The motion was renewed the 16th of *January* 1792. His Lordſhip adopted the above reaſons, and denied the motion.

Squirrel v. *Squirrel.*

Ex parte *Wallup*, an infant.

July 1792. Lords Commiſſioners Eyre and Aſhhurſt.

A writ of de ventre inſpiciendo, on the application of an ultra factus.

THE Curſitor was ordered to make out a writ *de ventre inſpiciendo*, directed to the ſheriff of *any* county (it being apprehended the woman would change her place of reſidence) to whom the plaintiff ſhould apply; but it was to remain in the office twenty-one days, and not

Ex parte *Wallup.*

not to be delivered if ſhe in a given time ſigned the Regiſter's book, conſenting that two midwives, to be named by the Earl of *Portſmouth*, the petitioner's father, ſhould examine her, and actually permitted them to examine her. The Lords Commiſſioners at firſt doubted whether ſuch a writ had iſſued on the application of any other than a *hæres natus*, the petitioner being a *hæres factus*.

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27 July 1792.

Andree v. ———

Liberty given, after replication, to amend bill, without withdrawing replication, by changing one of the defendants, who was the adminiſtrator, which was, in effect, adding a party.

AT the third Seal after *Trinity* Term, Mr. *Richards* moved, that the plaintiff might be at liberty to amend his bill without withdrawing the replication, on notice. (He had before moved it as of courſe, and obtained an order; but the circumſtances not being ſtated, and it being novel, the Regiſter declined to iſſue it.) The caſe he now ſtated was, that one of the defendants was the adminiſtrator of *J. S.* but as he had not been brought before the Court in that light, there would be a manifeſt want of parties when the cauſe came on to be heard. The Lord Chancellor ſaid, had the cauſe been brought on to hearing, it would have been ordered to ſtand over, with liberty for the plaintiff to amend by adding parties. Replications in ſuch inſtances are not ordered to be withdrawn; and therefore he ſaw no reaſon why the ſame order could not now be made, and the parties ſaved that expence; and therefore granted the motion.

Smith

Smith v. *Kempſon.*

29 Nov. 1790. Lord Thurlow C.

Injunction granted to ſtay a legatee from proceeding in the Spiritual Court for a legacy, until the hearing of the cauſe.

BILL by one of the executors, againſt a legatee and the other executor, for an account of, and to have the aſſets adminiſtered in payment of debts and legacies, and for an injunction to ſtay the legatee from proceeding in the Eccleſiaſtical Court for his legacy: On application for theſe purpoſes the 25th of *November* 1790, two doubts were raiſed; firſt as to the propriety of the motion, on the ground there was not an inſtance of ſuch an application; but on being ſhewn the caſe of *Stonehouſe* v. *Stonehouſe*, by Lord *Hardwicke*, 19 *Feb.* 1745, ſupr. 98. his Lordſhip granted an injunction: But it being queſtioned, whether this Court had ever granted ſuch an injunction, until after the hearing, his Lordſhip directed me to withhold the order; having laid before him the order in *Stonehouſe* v. *Stonehouſe*, which runs, 'Let an injunction be granted to ſtay the defendant 'from proceeding in the Court of Arches for his 'legacy, until the hearing of the cauſe, which the 'plaintiff is to ſpeed,' his Lordſhip directed me to deliver a ſimilar order.

Ex parte *Salter.*

17 Dec. 1792. Lord Thurlow C. 3 Bro. C. C. 500 S. C.

AN order having been made on the 4th of the above month, to approve of a perſon to be appointed guardian of an infant, and to have an allowance ſettled for his maintenance; there being no cauſe in Court, I pauſed to deliver it, and being appriſed an application was intended the above day by Mr. *Abbot*,

[illegible] that the order might be enlarged. I wrote to Lord [illegible], on the 22d of [illegible], as follows:

The order is in the same petition of *George Edie Lucas* an infant. The petition states, that *Elizabeth Rose Lucas*, by will dated 11th of *February* 1780, devised certain freehold, copyhold, and leasehold estates to the petitioner and his heirs. That he is the sole heir at law, though not the heir male. That, fraudulently and by undue influence, and at the instigation of the petitioner's father, the testatrix did, on the 11th of *October* 1790, make a pretended will of the same estates, and died. That the petitioner is of the age of seven years, and is entitled to have a proper guardian, and an allowance for his maintenance, and that, as it is admitted, that the mother who is intended to be appointed for guardian, may have a comfortable subsistence; and prays a guardian, maintenance, and a receiver of the estates, and also of the annuity; and that he may out of the rents and profits, and annuity, pay the maintenance that shall be allowed. The receiver, and costs which were prayed at the Bar your Lordship negatived: The petition, so far as it went to the approving of a guardian, and maintenance, your Lordship granted; the first readily, the latter seemingly with doubt; although two instances were mentioned, the first by Sir *Joseph Jekyl* M. R., the other by Lord *Hardwicke* confirming it; which was thought at the time by some of the first gentlemen at the Bar, as it since hath been, to have been more in compliment to Sir *Joseph Jekyll*, than his own opinion; and it is certainly true, as Mr. *Abbot* stated, that there have since been many like orders; but having been informed, that Lord *Kenyon* when Master of the Rolls, had rejected several similar applications,

upon

upon the ground, that there not being any ſuit, the Court was not in poſſeſſion of the property, and therefore had no controul over it: That where an infant had a teſtamentary guardian of his perſon and eſtate, ſuch guardian wanted not the authority of the Court: That maintenance was in his diſcretion, and that the granting of maintenance would be acting blindfold, and might give ſanction to a fraud againſt creditors, by miſapplying that, which they had a primary right to, as their debts might abſorb the whole of the property: And Sir *Pepper Arden* the preſent Maſter of the Rolls following Lord *Kenyon*'s opinion, or by his advice, having as Mr. *Dickens* hath been informed in ſeveral inſtances of late refuſed to allow maintenance, until there was a cauſe in Court, that he might know on what ground he acted, Mr. *Dickens* thought it his duty to ſubmit the ſame to your Lordſhip: Beſides which in the preſent caſe, the application is to have the maintenance paid out of *real eſtates deviſed*; whereas even ſhould there be a cauſe, and ſhould the will, if not admitted, be not proved *per teſtes*, the Court will diſmiſs the bill, or at leaſt not make any decree on it, ſo far it prays any thing reſpecting the real eſtate: And as where eſtates deſcend, and on a bill by creditors, the parol may demur, the Court hath of late been in the habit of appointing a receiver, with directions to pay his balances into Court, not to the account of the infant, but to the credit of the cauſe, ſubject to further order; and as in the caſe where a bill is brought to ſecure a legacy, will not apportion a fund to anſwer it, until it be ſeen the debts are paid (according to the common language of the decree, which directs them to be firſt paid) and the fund is

Ex parte *Salter.*

Ex parte *Salter.*

clear; it is rather ſingular, that the Court ſhould do it in an ex parte matter, without knowing whether there be any thing to which the infant is intitled: It may be ſaid, the caſe of an infant is pitiable, be it ſo; but pity is not to take place of juſtice.

For the above reaſons, Mr. *Dickens* hath deferred the delivery of the order, and being actuated by what he conceived to be his duty, he humbly hopes, he ſhall not be thought, by your Lordſhip, reprehenſible.

On the 24th of *November*, it was again mentioned by Mr. *Abbot*, when the Lord Chancellor ſtill expreſſing his doubts, he ordered it to ſtand over.

On the 17th of *December* 1794, it was again mentioned by Mr. *Abbot*, and he ſtated ſeveral precedents (*a*). The Lord Chancellor ſaid, although he could not bring his mind to coincide with them in general, as he hath ſince expreſſed himſelf to Lord *Loughborough*; he was borne down by their authority (*b*): And as a particular inſtance, he put this caſe: Suppoſe an infant appears to be intitled to a *ſpecific fund*, that is, where an infant is intitled under a ſettlement to an eſtate, or a portion, which is certain, and not ſubject to charges and debts, (which was in effect ſaying, he did not approve of a general application), it would be hard to oblige him to have a bill filed in his behalf, in order to obtain an allowance for maintenance: His Lordſhip therefore ordered the Maſter to *enquire* whether *any* and what allowance ought to be made for the maintenance of the petitioner, and out of what fund.

(*a*) See 3 Brown's Chan. Rep. 500. for the caſes, but it is a bad report of the principal caſe. J. D.

(*b*) See the following caſes.

Ex parte Duke of *Newcaſtle*, 1793, Lord *Loughborough* C. A ſimilar application, to refer it to the Maſter to conſider of a proper allowance for the Duke who was an infant: Submitting again to Lord *Loughborough*,

borough, my doubts as to the propriety of the application and my former reaſons, his Lordſhip ſaid, that he had converſed with Lord *Thurlow*, who ſaid it was true, that he had confirmed a report, under ſuch an order of reference, in ex parte *Salter*, being borne down with precedents, but that he was ſtill diſſatisfied, and would not now make the order; and upon the parties undertaking to file a bill, to bring the infant's affairs into Court, Lord *Loughborough* granted a reference to the Maſter, and afterwards confirmed the report, allowing 4000 *l.* but refuſed to direct payment of the allowance, until a bill was filed: a bill being afterwards filed, and the cauſe brought on to hearing, his Lordſhip after directing the neceſſary accounts, directed the allowance ſo made as aforeſaid, to be paid. Ex parte *Salter*.

And in ex parte ——, *Trin.* 1790, a ſimilar application was made to Sir *Pepper Arden* M. R. His Honour referred it to the Maſter, to conſider of an allowance for maintenance: The Maſter made his report, and on application to confirm it, his Honour directed the allowance to be paid for a limited time, that a bill might be filed, and a decree obtained in the mean time.

Kinaſton v. *Miller*.

THIS cauſe was heard by Sir *Thomas Clarke* M. R. the 11th and 15th of *Nov.* 1762: Judgment given 22d *Dec.* 1762, entered Reg. Lib. A. fol. 214. Mr. *Perrot* and Mr. *Altham* for the plaintiff; Mr. *Sewel* and Mr. *De Grey* for the defendants: The plaintiff by his bill ſtated, he was Rector impropriate of the pa-

Kinaſton v. Miller.

riſh of St. *Botolph Aldgate*, in the City of *London*, and as ſuch was under the decree in the 37th of *Hen.* 8. confirmed in Parliament, entitled to the tithes, duties, and profits, or the rates or compoſition for the ſame, due and payable for the ſeveral houſes, warehouſes, &c. in the occupation of the defendant; and by the bill, prayed an account, and payment of ſuch tithes, and that in confirmation of ſuch his right, on a bill filed by him in 1740, an iſſue was directed, to try whether the premiſes on which the plaintiff claimed tithes were in *London*, which being found, on hearing the cauſe on the equity reſerved, the Court declared the plaintiff as impropriator of the ſaid pariſh was entitled to tithes of ſuch part of the ſaid pariſh, as was ſituate in *London*, or the liberty thereof, according to the Statute of the 37th of *Hen.* 8. and it was decreed accordingly; that ſome of the defendants having died, the plaintiff prayed, that ſuch of the defendants as were in the occupation of the ſaid houſes, &c. might account.

The defendants by their anſwer diſputed the right, inſiſting that the land on which the houſes were erected, was formerly, at the diſſolution of the monaſteries by the Act of the 31ſt of *Hen.* 8. parcel of the Abbey of *Grace*, which was of the *Ciſtertian* order, and at the time of the diſſolution, was in the hands and poſſeſſion of the ſaid Abbey, exempt from tithes, and ſo had continued for near two hundred years; but that if the defendants were ſubject to tithes for the ſaid houſes, they ſubmitted, whether as the plaintiff claimed under the decree in the bill, his ſuit ſhould not have been inſtituted conformably to the ſaid decree, and brought before the Mayor of *London*.

On

Kinaſton v. Miller.

On the 22d *December* 1762, his Honour gave judgment, and was clearly of opinion, that this Court had cogniſance of ſuch ſuit; and decreed the defendants to account for, and pay what ſhould be found due with coſts.

Minor Canons of St. *Paul's* v. *Creſpigny* in 1794, before Lord *Loughborough* C. A like claim under the decree of the 37th of *Hen.* 8. and the juriſdiction of this Court diſputed; upon laying the preceding caſe before his Lordſhip, he was ſatisfied as to the juriſdiction of the Court, and made a decree.

V.

28 Nov. 1791.

Affidavit to ground an order for a plaintiff to give ſecurity to anſwer coſts, when it doth not appear by the bill he lives abroad out of the juriſdiction of the Court, if he hath left the kingdom ſince filing the bill, muſt go on and ſay, to *ſettle abroad.*

ON a ſpecial application, that the plaintiff who had gone abroad ſince filing the bill, might give ſecurity to anſwer coſts, but the affidavit on which it was founded not going on to ſwear, he had left the kingdom to *ſettle abroad:* his Lordſhip doubted, and by Mr. *Green* the Regiſter, who then attended, directed me to acquaint his Lordſhip what I conceived to be the courſe on that head: Upon which I wrote him as follows: That upon my coming into the office, which was in the year 1737, a liſt of applications, ſuch as are of courſe, with a book of the forms of orders on ſuch applications, (and which correſponds with a book of precedents, which belonged to a clerk in the laſt century), was put into my hands to copy; among which is one for a plaintiff to give ſecurity to anſwer coſts: It runs thus:

—— v. ——

"Upon motion, &c. it was alleged, it appears by "the plaintiff's bill that he *lives* at out of "the juriſdiction of this Court, and therefore it was "prayed that the plaintiff may give ſecurity to anſwer "coſts, (in the uſual way), which is ordered ac- "cordingly."

So likewiſe if a plaintiff, after filing a bill, leave the kingdom for the purpoſe of ſettling and do actually take up his reſidence in foreign parts, it is a ground in any ſtage of the cauſe for a like order; but that it was never underſtood that a party's going to *Spa*, or *Liſbon* for his health, to *Holland*, &c. upon buſineſs, or engaging himſelf with a ſailing party to ſee the Rock of *Gibraltar*, &c. was that kind of *living* abroad, that would warrant ſuch an application. On renewing the application this 28th of *Nov.* 1791, the Lord Chancellor was decidedly of opinion there was not ſufficient ground for the order; but the plaintiff having made an affidavit upon another occaſion in another Court, that he was gone to reſide abroad, which was intended to be brought forward; he therefore by his Counſel conſented, and by ſuch conſent it was ordered, that the plaintiff ſhould give ſecurity to bear coſts.

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23 Jan. 1792. Lord Thurlow C. 3 Bro. C. C. 429 S. C.

Anderſon v. *Lewis*, et è contra.

Application to ſerve the Clerk in Court, for plaintiffs in the to and anſwer the

MR. *Graham* moved on behalf of the plaintiffs in the croſs-cauſe, that ſervice of a ſubpœna to appear and anſwer on the Clerk in Court for the original cauſe who were defendants in the croſs cauſe, with a ſubpœna to appear croſs bill, refuſed; as being contrary to all rule.

plaintiffs

plaintiffs in the original cauſe, (who were defendants in the croſs-cauſe), might be good ſervice on them, not for that all of them could not be found, but for that they were numerous, ſome of them inſolvent, ſome in *Scotland*, and others Peers, who would be to be ſerved with the Lord Chancellor's letter *miſſive*, as it would ſave much time, and trouble. The Lord Chancellor, without hearing Counſel againſt the motion, ſaid it was contrary to rule: *non conſtat* their Clerk in Court as plaintiffs, would be ſuch as defendants; each might chuſe to appear and anſwer ſeparately, by different Clerks in Court; and that were he to make ſuch an order, he could not compel the Clerk in Court to appear for them; and were he to appear, proceſs of contempt could not be carried on againſt the defendants, and therefore he denied the motion: And his Lordſhip ſaid, he knew but one inſtance in which this Court permitted ſuch ſervice, and that was, ſervice on an attorney for a plaintiff at law, and the plaintiff was abroad, or could not be found to be ſerved with a ſubpœna; and ſuch ſervice was merely to ground an application for an injunction, and no farther; and as improper uſe had been made of ſuch permiſſion, it having frequently happened that a defendant at law after a verdict againſt him, having learnt that the plaintiff at law was gone to the *Eaſt Indies*, or ſome parts beyond the ſeas, and that it would be a conſiderable time before he could return and anſwer, ſo as to get rid of the injunction, filed a bill merely for delay, without the leaſt equity, this Court having adopted the practice of the Court of Exchequer, requires, when a defendant at law having

Anderſon v. Lewis, et è contra.

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having filed a bill in this Court againſt a plaintiff at law for an injunction, and applies to ſerve the attorney at law with a ſubpœna to appear and anſwer, that ſuch application ſhall be accompanied by an affidavit of the plaintiff's caſe, and the equity he ſets up under it, that the Court may ſee whether the plaintiff hath any equity.

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v.

25 April 1792. Lord Thurlow C.

BILL by an executor for the direction of the Court: he ſtates by his bill he hath ſeveral balances in his hands of different ſtocks, caſh, &c. and ſubmits to account.

The Court will not order a plaintiff to produce a deed ſo ſtated in his bill, at the inſtance of a defendant before hearing: he muſt file a croſs bill for the purpoſe.

Application by Mr. *Stratford* for the defendant the above day, that the plaintiff might transfer the funds, and pay the caſh in his hands to the account of the Accountant General of this Court, on the credit of the cauſe generally: no one appearing for the plaintiff, an affidavit of ſervice was read.

Lord Chancellor.—Did you ever know an inſtance of a *defendant*'s applying againſt a plaintiff, even to produce deeds? There cannot be any; it hath been denied. If you want it, you muſt file a croſs-bill for the purpoſe. Take nothing by the motion.

Skinner

Skinner v. *Warner*.

25 Nov. 1792. Lords Commiſſioners Eyre and Aſhhurſt.

A father a bankrupt and ſeparated from his wife, and on bail to articles of the peace ſworn againſt him by his wife, ordered not to remove the children from the ſchools at which they were placed, and not to interfere in their education.

THIS came before the Court on the petition of the infant children, ſtating, that previouſly to the marriage of the petitioners' father and mother, 2000 *l.*, part of the mother's fortune, was veſted in truſtees, for her ſeparate uſe, during her life, and afterwards for the child or children of the marriage, and if there ſhould be no children, to her appointment.

That the infants' mother, after the ſettlement and marriage, became entitled to a legacy of 2000 *l.*, and her huſband, the plaintiffs' father, having become bankrupt, his aſſignees, the plaintiffs in the cauſe, filed a bill againſt *Warner* and his wife, and their children, and the truſtees in the above ſettlement, for an account of, and to be paid the ſaid legacy. On hearing the cauſe the 12th of *March* 1786, before the Maſter of the Rolls, the ſaid legacy of 2000 *l.* was ordered to be paid into the Bank, and laid out in the name of the Accountant General, which was done accordingly, and the ſame amounted to 3879 *l.* 8 *s.* 6 *d.* Bank Annuities; and the aſſignees were to lay propoſals before the Maſter, for a ſettlement on the wife and her children.

The aſſignees having propoſed that 1000 *l.* ſhould be paid to them, and the reſt ſettled for the ſeparate uſe of the wife for her life, and then for her children; the Court confirmed the Report, and ordered 1000 *l.* to be raiſed, and paid to the aſſignees, and the reſt ſecured for the wife and the children.

The petitioners, the infants, being the iſſue of the marriage, and their father not being able to maintain and educate them, the truſtees in the ſettlement, their uncles, took that charge upon themſelves.

That

Skinner v. Warner.

That the petitioners' father having, by his cruel treatment, obliged the petitioners' mother to exhibit articles of the peace againſt him, on which he was then on bail; and having no ſettled place of abode, and being unable to maintain the infants, but claiming to be their guardian by nature; the infants prayed by their petition that it might be referred to one of the Maſters to approve of a proper perſon or perſons to have the care of the petitioners' perſons, and to ſuperintend their education; and that the father ſhould be reſtrained from removing, or uſing any means to remove the children from the ſchools at which they were then placed: which, after hearing Counſel, their Lordſhips ordered.

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27 April 1797. Lord Loughborough C.

Moore v. *Aylet.*

Arreſting a party going to attend, or returning from attending an arbitration, having been ſummoned for the purpoſe, held a breach of privilege, and he was ordered to be diſcharged.

THE defendant *Aylet* being arreſted as he returned from attending *Samuel Compton Cox*, Eſq. to whom the matters in difference were referred, and to attend whom he had been ſummoned; he complained, and prayed to be diſcharged, being, as he ſubmitted, under the protection of the Court. A doubt having ariſen, whether arreſting a party going to, or returning from attending a Maſter or an Arbitrator under an order of Court, who was his ſubſtitute, was to be conſidered as a breach of privilege; it ſtood over: And his Lordſhip this day ſaid he had looked into his notes of practice, and found a party attending a Judge at chambers, the prothonotary, or executing a writ of enquiry, was under the protection of the

Court, and could not be arreſted: That a man's houſe was his caſtle, and that ſo long as he kept himſelf cloſe in his houſe, he could not be arreſted: And to allow him to be arreſted when drawn out by an order, or ſummons of the Court, which, if he had not obeyed, he would have been guilty of a contempt, and liable to be attached, was abſurd: Here the party was drawn from his houſe by a ſummons: His Lordſhip therefore ordered him to be diſcharged. *Moore* v. *Aylet.*

Walker v. *Thomas.*

31 Jan. 1785. Lord Thurlow C.

APPLICATION to examine the guardian *ad litem* of a defendant: His Lordſhip was of opinion it might have been done without an order; but, to quiet the parties, he ordered it.

It is of courſe to examine a guardian *ad litem*, as a witneſs.

Ex parte *Billet.*

20 Dec. 1786. Sir Lloyd Kenyon M. R.

THE Curſitor was ordered to make out a writ *de ventre inſpiciendo.*

The Attorney General v. the Mayor of *Coventry.*

5 Feb 1712. Reg. Lib. A. 178.

THOMAS *Owen*, the Mayor of *Coventry*, was ordered to ſtand committed for not putting the Corporation Seal to ſome leaſes, purſuant to an order for that purpoſe.

The Mayor of Coventry committed for not obeying an order of the Court.

Cheveley

26 Feb. 1771. Lord Bathurſt C.

Cheveley v. *Stone.*

A creditor by covenant, equal to a creditor by bond.

THE plaintiff, a creditor, under a covenant in her marriage articles, to ſettle an eſtate of ſuch a value, and likewiſe adminiſtratrix of *Jeremiah Cheveley* her late huſband.

The defendant's bond creditors bring an action againſt her on their bond; ſhe files a bill in this Court for an injunction, and obtains an injunction.

Cauſe ſhewn this day for continuing it.

Lord Chancellor.—A creditor by covenant is equal to a creditor by bond; and therefore, upon payment of coſts at law, let the injunction be continued till the hearing.

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24 July 1741. Lord Hardwicke C.

Terran v. *Waite.*

The plaintiff allowed to rehear the cauſe, when his bill had been diſmiſſed for want of his appearing at the hearing.

THE cauſe was ſet down to be heard *ad requiſitionem defendentis*: the plaintiff appeared, and prayed to adjourn the cauſe, conſenting to appear *gratis*, and open his bill. The cauſe came on again to be heard, when the plaintiff made default in appearance, and the bill was diſmiſſed with coſts. The plaintiff obtained an order to rehear the cauſe. On application the above day to diſcharge the order, it was ordered, upon the plaintiff's paying coſts to the defendant, and conſenting alſo to pay ſuch coſts as ſhould be awarded againſt him on rehearing the cauſe, the order ſhould ſtand, or otherwiſe be diſcharged.

Attorney

Attorney General v. *Brereton*, et è contra.

14 July 1752.
2 Ves. 425. S.C.

Lord *Hardwicke* C.

Flint Chapel. In whom the right of nomination of a curate, whether in the biſhop who is ſinecure rector, or in the vicar held to be in the vicar, without power of removing.

THESE cauſes came on upon two bills; the firſt by way of information, at the relation of Mr. *Tamerlane*, to eſtabliſh his right to the Chapel of *Flint*, as Curate thereof.

The croſs-bill, by Mr. *Brereton*, as Vicar of *Northop*, to eſtabliſh his right to the chapel.

Two objections aroſe for conſideration; one made at the Bar, the other occurred to me: It was objected, firſt, That this Court hath not juriſdiction to determine rights of this kind, and an information can only be brought in the name of the Attorney General for a charity; but I ſhall here conſider the augmentation made by Mr. *Stone* of 20 *l.* a-year, and the confirmation by Biſhop *Barrow* as a charity, by virtue of the Act of 29th of *Car.* 2. chap. 3. and therefore I am of opinion an information is proper.

The ſecond objection is, that the relator founds his caſe on a right of nomination in the Rector, or Biſhop of St. *Aſaph*, who is a *ſinecure* Rector, whereas he was nominated by the Vicar; but I hold, if the right to the charity appears, though that right be not properly laid in the information, the Court muſt make a decree to eſtabliſh the charity.

And this brings me to the conſideration of the three queſtions relating to the merits:

Firſt, What is the ſpecies and nature of the Chapel of *Flint*; whether a perpetual Curacy, or temporary only?

Secondly, In whoſe right the nomination is?

Thirdly,

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Thirdly, Whether the Rector, or Vicar who hath the right of nomination, hath the right of amotion of the Curate or Chaplain at will?

On the firſt queſtion it appears, that this is a Chapel belonging to a county town, and hath belonging to it all ſorts of parochial rights; the inhabitants have no right in the pariſh Church of *Northop*, and are not liable to the repairs of the Church; which ſhews the Chapel of *Flint* to be a perpetual Chapel.

Vide *Selden's Hiſtory of Tithes*, vol. 3. column 1212. Further, the rights and dues of the Curate concur to ſhew it to be a perpetual Curacy, the Curate enjoying all ſmall tithes, and the ſurplice fees; beſides the above augmentation by Mr. *Stone*, and which augmentation ſhews it was underſtood to be a perpetual Curacy. And therefore am of opinion, this is a perpetual Curacy.

Upon the ſecond queſtion, In whom is the right of nomination?

I am of opinion the right is in the Vicar; there is no proof in theſe cauſes that any nomination hath been made by the Biſhop, nor that any nomination hath ever been made by the *ſinecure* Rector, further than by granting the licence, and the evidence as to the nomination by the Vicar is very conſiderable, there being evidence of three nominations by the Vicar.

And upon the third queſtion, Whether the Vicar can remove?

If this is a perpetual Curacy, it cannot be at the pleaſure of the Vicar, for if it could, the Vicar might take the whole of the endowment to himſelf, which is contrary to the intention of Mr. *Stone*, and the town of *Flint* would be without a Curate reſiding.

His Lordſhip therefore decreed for the relator.

Took

Took v. ———.

28 Nov. 1784. Lord Thurlow C.

A mortgagee after he hath foreclosed the mortgagor, cannot bring an action on his bond, or the covenant in mortgage, until the estate hath been fairly sold, and it is seen whether the purchase money is deficient; for until it is sold, the estate remains a pledge, and non constat, but it may be ample. Sed vide supr. Aylet v. Hill, supr. 551.

THE bill in the original cause by the mortgagee was, that the defendant, the mortgagor, might redeem, or stand foreclosed; and there was the common decree of foreclosure; the defendant not paying the money reported due by the time appointed, he was absolutely foreclosed. The plaintiff, the mortgagee, afterwards sold the estate so foreclosed, and the money produced by the sale not amounting to what was reported due on the mortgage, he brought his action against the mortgagor to recover the deficiency. The plaintiff in this suit thereupon brought his bill for an injunction, to stay the defendant's proceeding at law, upon the ground that having got his pledge, he could have no more, and obtained an injunction till answer, and further order.

Upon shewing cause this day, for the continuance of the injunction, his Lordship was clear that the defendant, the mortgagee, under the mortgagor's covenant in the mortgage deed, was entitled to be paid what was due on the mortgage; that so long as he kept the estate, he must take the pledge as a satisfaction, because, by not knowing what it would produce, he could not say any thing was due; but if he sold the estate fairly, and without collusion, and for the best price, it would then appear whether it produced the amount of the money reported due; and to the extent of what it did not, the mortgagee had a right, and so it was now established, to bring an action against the mortgagor to recover the deficiency; and therefore his Lordship disallowed the cause, and dissolved the injunction.

Eaſter Term 1753. Lord Hardwicke C.

Robertſon v. *Wilkie.*

A writ of ne exeat regno iſſued againſt the defendant, whoſe place of reſidence was at Port Mahon, with whom the plaintiff's teſtator was in partnerſhip, and to be marked in 2000 l. the amount of what he believed the defendant to be indebted on a balance of accounts.

William Robertſon, deceaſed, a merchant in *London*, and the defendants, who then reſided at *Gibraltar*, having agreed to become partners in thirds, on his own credit purchaſed ſeveral large quantities of goods and merchandiſe, and conſigned the ſame to the defendants, which they received and ſold to great advantage, but always refuſed to account with him, although applied to for that purpoſe. The ſaid *William Robertſon* died in 1751, and the plaintiff became his adminiſtrator: After giving the ſaid defendants credit for every ſum of money remitted by them to the ſaid *William Robertſon*, they ſtood juſtly indebted to him at his death in 1395 *l.* 17 *s.* 7½ *d.*, on the balance of accounts between them for the prime coſts of the ſaid goods, over and above the ſum of 765 *l.* 18 *s.* 10 *d.* on a ſtated account of intereſt due for the advance of money, which account of intereſt was ſettled and allowed by the ſaid *Robert Wilkie*, when he was laſt in *England*, and alſo beſides a very conſiderable ſum of money due for the profits of the ſaid ſeveral cargoes ſo conſigned to them: The uſual place of reſidence of the defendant was at *Port Mahon* in the iſland of *Minorca*, out of the juriſdiction of the Court: The defendant, *Robert Wilkie*, was in *London*, and propoſed to continue there about ten days, or a fortnight at fartheſt, at which time the plaintiff was credibly informed, and verily believed, the ſaid defendant *Wilkie* would proceed and ſail to *Port Mahon* without any proſpect of his returning to *England*, whereby the plaintiff, as adminiſtrator

tor of the ſaid *William Robertſon*, would not only be deprived of having a fair account from the defendants of the ſeveral matters aforeſaid, but alſo of receiving the ſaid two ſums of 1395 *l.* 17 *s.* 7½ *d.* and 765 *l.* 18 *s.* 10 *d.* from him to the plaintiff, as adminiſtrator of the ſaid *William Robertſon*. The plaintiff preferred his petition to the Lord Chancellor, ſtating to the effect aforeſaid, with an affidavit annexed, verifying it, and praying a writ of *ne exeat regno*, which was ordered; and that the ſame ſhould be marked in the ſum of 2000 *l.*, and the writ be endorſed in words at length, and not in figures. *Robertſon v. Wilkie.*

Sleeman v. *Sleeman.*

3 March 1772. Lord Bathurſt C.

BILL to eſtabliſh a will; the heir at law by his anſwer admitted the will, but died before the cauſe was brought to hearing, and left an infant heir; and by a bill of revivor the infant was made a defendant, and the ſuit revived. It was held, that the bill muſt be proved *per teſtes* againſt ſuch infant heir.

Mitchel v. Duke of *Mancheſter.*

8 Dec. 1750. Lord Hardwicke C.

TENANTS directed to pay their rents, in a given time, on the firſt application, or to ſtand committed; and the Receiver to be at liberty to diſtrain on *one* tenant; the like as to paying rent: *Heaviſide* v. *Heaviſide*, *Weſton*, 6 *November* 1754; and *Bolas* v. *Corbet*, 1ſt *November* 1756.

10 July 1754. Lib. A. fol. 306. Lord Hardwicke C.

Depoſitions of witneſſes taken de bene eſſe in 1711, and publication not having paſſed till 1743, the depoſitions ordered to be publiſhed without prejudice.

Duke *Hamilton* v. *Meynal.*

THE plaintiff applied, that the depoſitions of witneſſes taken *de bene eſſe* in the original cauſe, might be publiſhed at the time publication paſſed in the ſupplemental cauſe; but the bill having been filed in the year 1710, and the examination taken in the years 1710 and 1711, and no replication till 1742, the Lord Chancellor ſaid he would cauſe precedents to be ſearched; and on the above day directed the depoſitions to be publiſhed, without prejudice to any exception that might be made by any of the defendants at the hearing againſt the reading of any of the depoſitions againſt them.

Note.—This was granted upon particular circumſtances, and the delay is accounted for in the ſuggeſtion of the order. J. D.

8 Dec. 1744. Lord Hardwicke C.

A perſon ordered to be examined pro intereſſe ſuo, was permitted to proſecute, and make out her right in forma pauperis.

James v. *Dore.*

ONE *Julia Crees* claiming title to ſome lands taken under a ſequeſtration, ſhe was ordered to be examined *pro intereſſe ſuo*, and was accordingly examined; but being unable, through poverty, to make out and ſupport her right, liberty was given to proſecute and make out her right *in formâ pauperis.*

Smith v. *Smith.*

26 March 1751. Lord Hardwicke C.

Schedules of accounts referred to in the Maſter's report, muſt be annexed to and filed with the report, and not entered in a book, and kept in the Maſter's office, as was attempted in this caſe.

THE Maſter in taking the accounts of the perſonal eſtate of the teſtator Sir *Robert Smith*, of whom *James Smith* and *Cecil*, two ſolicitors of the Court of Chancery were executors; at their inſtance, inſtead of annexing the ſchedules to his report, as had been uſually done, and in fact to create new fees in his office, for making copies of them, entered the ſchedules in books, as was the cuſtom of the ſchedules allowed in paſſing Receivers accounts.

Mr. *Scott* then the clerk of the reports, with whom reports were filed, refuſed to file the report, unleſs the ſchedules were annexed and filed with it, for that he conſidered them as part of the report being referred to by it; that the ſchedules were confirmed as part of the report; that exceptions to reports were chiefly to the items in the ſchedules, brought in as charges and diſcharges, and either allowed, or diſallowed.

Upon this refuſal, Mr. *Smith* and Mr. *Cecil* applied by Mr. Solicitor General their Counſel, that Mr. *Scott* might be ordered to file the report as tendered to him.

Mr. Attorney General and Mr. *Wilbraham*, were Counſel for Mr. *Scott.*

Lord Chancellor.—From 1703, the Maſters have exerciſed a diſcretionary power in accounts of infants' eſtates, whoſe annual accounts are to be paſſed, of entering ſchedules in books.

In the order of the Lords Commiſſioners, made an order of Court the day of 1742, not the leaſt variation is intended to be made to it.

Smith v. *Smith.*

The eaſe of the ſuitor is meant by their order, not confining it to thoſe accounts, but generally, as where there are numbers of creditors, they may take copies of what relates to their own debts; but from whom are they to take thoſe copies? Certainly not from the Maſters; they make their report, they deliver it out, and are paid for it; when it is delivered, the order of Court directs it to be filed with the proper officer, to be preſerved, and as it were made a record: If an advantage is to ariſe to any one, certainly the officer who hath the cuſtody and care of the report, ſhould have the benefit; it is abſurd to ſuppoſe, that 4 *d.* allowed for filing every report, is the only recompence or benefit the Maſter of the Report Office is to have for his trouble, and care.

As to the account of the Capital of the perſonal eſtate, I have no doubt but that it ought to be annexed by way of ſchedule, and filed; and that would be right to be done in this caſe; and I ſhall expect the Maſter to alter his report, by annexing the capital of the perſonal eſtate by way of ſchedule.

I ſhall make no order about it, but acquaint the Maſter, that I would have the report altered in that manner.

Care muſt be taken, that *no new fees* be created in the Maſter's Office, for it may be eaſily ſeen what that would tend to,

Duke

Duke of *Beaufort* v. *Bertie*.

5 July 1721. Lord Macclesfield C. Reg. B. A. fol. 310. 1 P. Wms 703. S. C.

IT was laid down that ſtatute guardians, are the ſame as guardians in ſocage; and if a guardian be attainted, the guardianſhip devolves on the Great Seal.

Wilkes v. *Wilkes*.

25 March 1757. Lib. B. 177. Sir Thomas Clarke M. R.

THE defendant *Mary Wilkes* the wife of the plaintiff, was at the time of her marriage, ſeiſed of real eſtates, and poſſeſſed of conſiderable perſonal property: On her marriage, by indenture dated 21ſt of *May* 1747, her real eſtates were ſettled; part of her perſonal eſtate was to be aſſigned and transferred to the plaintiff, and the reſt was veſted in the defendants the truſtees, ſubject to the appointment of the defendant the wife: Differences ariſing between the plaintiff, and his wife, they agreed to live ſeparate; and the plaintiff agreed that ſhe ſhould live unmoleſted with her mother; and by indenture dated the 23d of *September*, the plaintiff agreed to pay his wife 200*l.* a year during his life, and to give up all power over her, and *that ſhe ſhould* live ſeparate from him; and ſhe executed the power of appointment reſerved to her by her marriage, in favour of the plaintiff, and the indenture dated the 7th of *December* 1756, was executed by the plaintiff and his wife, and the truſtees for the carrying the ſaid appointments, and agreements into

This Court will not eſtabliſh an agreement between a man and his wife to live ſeparate.

Wilkes v. *Wilkes.*

into execution, by which it was *particularly* agreed, that the *plaintiff and the defendant ſhould live ſeparate*, and the plaintiff conſented to it.

The defendants the truſtees declining to act without the direction of the Court; the plaintiff filed his bill to have the deed of appointment carried into execution.

On the above 25th *March* 1757, the cauſe was heard, and his Honour diſmiſſed the bill ſo far as it went to eſtabliſh the agreement for a ſeparation, ſaying that was not the province of this Court, but without prejudice to any other remedy or agreement the parties may take, or have taken, or may make, or have made, concerning the ſame, and by conſent of the plaintiff by his Counſel, and the defendant the wife preſent in Court conſenting that all the other parts of the bill, and alſo the deed of appointment might be carried into execution; the ſame was decreed.

Mount

Mount v. *Turner.*

25 July 1732, Lord King C.

A SPECIAL injunction diſſolved upon original motion, without having an order to diſſolve it unleſs cauſe was ſhewn to the contrary.

A ſpecial injunction diſſolved upon original motion.

Norton v. *Aylet.*
22d *April* 1749,
Lord *Hardwicke* C. the like.

Newton v. *Foot,*

2 James 2d. Reg. Lib. B. fol. 629.

THE clerk of the plaintiff's ſolicitor, ſat as clerk to the Commiſſioners for the examining of witneſſes.

Upon application to ſuppreſs the depoſitions taken under the commiſſion, they were for that reaſon ſuppreſſed.

Depoſitions ſuppreſſed, becauſe the clerk of the plaintiff's ſolicitor, ſat as clerk to the commiſſioners.

Barneſly v. *Powel.*

18 Dec. 1747. Lord Hardwicke C. 3 Atk. 593. S. C.

BY the rule of the Court, the plaintiff is firſt entitled to ſue out a commiſſion to examine witneſſes, and if the defendant hath an opportunity to examine his witneſſes alſo, and doth not, he is not entitled to a new commiſſion; but if the plaintiff neglect to ſue out a commiſſion, the defendant may; and ſo it was laid down by the Lord Chancellor. See *Minie* v. *Raw.*

Meggot

1742. Lord Hardwicke C.

Dower to be aſſigned.

Meggot v. *Meggot.*

DOWER decreed to be aſſigned.

14 March 1769. Lords Commiſſioners.

The procheinamy of the plaintiff an infant, ordered to pay the coſts of an improper and unfounded applications.

Buckton v. *Buckton.*

APPLICATION on the behalf of the plaintiff who was an infant, that the defendant, the executor, might be reſtrained from receiving any more of the teſtator's perſonal eſtate, denied, and the *prochein amy* of the plaintiff, ordered to pay the coſts of the application.

3 Dec. 1742. Lord Hardwicke C. 2 Atk. 469. S.C.

Two printers committed to the priſon of the Fleet, for publiſhing a letter touching the proceedings of this Court in theſe cauſes.

Roach v. *Garvan*, et è contra.

UPON ſpecial application of the defendants *Hall* and *Garvan*, ſtating that *John Huggins*, in the order mentioned, had cauſed to be printed and publiſhed in a paper, entitled No. 471, *The Champion, or the Evening Advertiſer*, by Captain *Hercules Vinegar* of *Pall Mall*, *Tueſday*, 23 *Nov.* 1742, a letter directed to the Champion, beginning with theſe words: *viz.* "Sir, It hath been obſerved long ago," and ending with theſe words: "but even receive the ſanction of "a Court of Judicature:" as by the ſaid paper more fully appears; that the ſaid letter, ſo printed and publiſhed,

publiſhed, contained ſeveral aſperſions upon the ſaid defendants *Garvan* and *Hall*, touching their proceedings in the matters in theſe cauſes, and upon ſeveral perſons who have made affidavits concerning *Marianna Rouvitte* and her children, and do groſly miſrepreſent the proceedings in theſe cauſes, inſomuch that the ſaid defendants *Hall* and *Garvan* hoped the Court would cenſure *Mary Read* and *John Huggins*, (who were the printers of the ſaid paper), for the ſame. *Roach* v. *Garvan*, et è contra.

His Lordſhip, upon hearing a certificate read, that *John Huggins* was a priſoner in the Fleet priſon, ordered the ſaid *Mary Read* and *John Huggins*, for their contempt of this Court, to ſtand committed to the priſon of the Fleet, and that the ſaid *John Huggins* ſhould be confined within the walls of the priſon.

On the 19th *February* 1742, they were ordered to be diſcharged as to their ſaid contempt, on their payment of coſts to be taxed.

Cann v. *Cann.*
3 *July* 1754.
A like order upon a ſimilar application.

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31 Jan. 1772.
Lord Bathurſt C.

Goodenough v. *Goodenough.*

Dower to be ſet out by the Maſter, and the dowreſs to be let into poſſeſſion.

DOWER decreed to be allotted, to be ſet out by the Maſter, and the dowreſs to be let into poſſeſſion.

Carr

9 May 1786. Sir Lloyd Kenyon M. R.

Carr v. *Elliſon*

Perſonal eſtate deviſed by will, to be laid out in the purchaſe of lands, to be conſidered as land until laid out.

THIS was a queſtion between the heir of the deviſee and the perſonal repreſentative, whether perſonal eſtate directed by the will to be laid out in the purchaſe of land, and the deviſee dying before it was laid out, was to be conſidered as real, or perſonal eſtate?

Sir *Lloyd Kenyon* M. R.—Where perſonal eſtate is directed to be laid out in land, ſuch perſonal property is to be conſidered to all eternity as land until laid out; and a huſband will take an eſtate in it by the curteſy: And his Honour cited *Bowes* v. Lord *Shrewſbury*, and declared the plaintiff as heir *ex parte maternâ* was entitled under the will to the money; and he electing to take the ſame in ſpecie, inſtead of having the ſame laid out in the purchaſe of land, the ſame was decreed to be paid to him.

15 June 1784. Lord Thurlow C.

Devie v. Lord *Brownlow.*

The coſts of an application for a new trial of an iſſue directed out of Chancery, denied: They do not of conſequence in this Court, come within the coſts of ſuit.

APPLICATION, after trial of an iſſue, directed from the Court of Chancery, to eſtabliſh the plaintiff's right, and to be paid coſts of ſuit, including therein the coſts of an application by the defendant for a new trial, which had been denied.

The Lord Chancellor ſaid, if a party apply at law for a new trial, and fail, the Maſter of the King's Bench taxes the coſts of ſuch application, as incident to the coſts of the trial, and argued, that by parity of reaſon

ſon that rule ought to be held in this Court; but ſuch coſts do not in this Court, of conſequence, come within the coſts of the ſuit; for if they did, there would be no occaſion for the Court, on denial of ſuch an application, to deny it *with* coſts, but to be ſilent: Every day's experience proves it; for when a cauſe is brought to hearing upon the equity reſerved, after trial of an iſſue, on a particular action directed by this Court, the Court, if they mean to give the coſts at law, eſpecially direct payment of ſuch coſts, together with the coſts of the ſuit in this Court.

Davie v. Lord *Brownlow.*

Woodward v. *King.*

Mich. Term, 26 Car. 2. 1673. Lord Nottingham C. 2 C.C. 203. S.C.

A COPY of an injunction was ſerved, and the original ſhewn; the party ſerving the injunction was held not to be bound to leave the orignal injunction to be compared with the copy; and his Lordſhip likewiſe held, that although the injunction might iſſue irregularly, yet, till found ſo, it ought to be obſerved.

Sheppard v. *Meſſider.*

Sir Thomas Sewel M. R.

THE plaintiff was a legatee in the will of *Elizabeth Walker*, and brought his bill for payment; the cauſe came on this day.

Bill by a legatee for his legacy; there had been a ſuit by another legatee, and a decree for account of teſtator's eſtate and payment, the plaintiff in this cauſe at liberty to proſecute that decree.

There had been a *decree* in another ſuit, brought by another legatee.

His Honour gave liberty for the plaintiff to go before the Maſter in the former cauſe and claim his legacy,

Sheppard v. Meſſiter.

legacy, and the Maſter to take an account of what was due to the plaintiff in reſpect of it; and if the ſuit is abated, the parties to revive it forthwith, and the plaintiff to be at liberty to proſecute the accounts directed by the ſaid former decree, and reſerve coſts; and after the report, the plaintiff to be at liberty to ſet down the cauſe as to coſts, and ſuch further directions as may be neceſſary at the ſame time; but the accounts, ſo far as they are already taken, are to be conſidered as binding on the plaintiff, and they are not to diſturb the ſame.

And if it ſhall appear the ſuit hath abated, let ſuch of the parties in the former cauſe as are parties in this cauſe forthwith revive the ſame.

Attorney General v. *Tancred.*

A RECEIVER having been appointed, with the uſual directions for the tenants to attorn; and a tenant having been ſerved with a writ of execution of the order, and arreſted upon an attachment, and turned over to the Fleet, application was ſeveral times made for a ſequeſtration, but the Court refuſed it as a double execution, he being no party to the ſuit.

Note.—The party ſeems to have proceeded irregularly from the firſt; there was no need to have ſerved the tenant with a writ of execution of the order and report, but only with a copy, to ground an application for a commitment, which is the courſe againſt perſons not parties; it being laid down as an eſtabliſhed rule, that nothing under the Great Seal can iſſue, but *inter partes*; and therefore, inſtead of an attachment, the party ſhould have moved to commit the tenant for diſobeying the order.

Lonergan

Lonergan v. *Rokeby.*

23 Nov. 1749. Lord Hardwicke C.

Diſcovery after publication that the plaintiff lived abroad, he was ordered to give ſecurity to anſwer coſts.

IT being diſcovered, after publication had paſſed, that the plaintiff reſided abroad, as he had many years, all proceedings on the original and ſupplemental bills were ſtayed, until the plaintiff ſhould give ſecurity to anſwer coſts.

Holdſworth v. *Holdſworth.*

8 Feb. 1783. Lord ThurlowC.

THIS cauſe came to be heard the above day, on an appeal from a decree at the Rolls: Parties appeared to be wanting: It was ordered to ſtand over, with liberty for the plaintiff to file a ſupplemental bill, merely to add parties.

Hewatſon v. *Tookey.*

6 July 1785. Lord ThurlowC.

A bankrupt plaintiff, though he hath obtained his certificate and hath releaſed, cannot be examined as a witneſs, as he is liable to coſts.

THE plaintiff in the original cauſe having been concerned in a tranſaction of negociating notes, of which he was an indorſer, he filed his bill to be relieved againſt the tranſaction, and afterwards becoming a bankrupt, his aſſignees filed a ſupplemental bill in nature of a bill of revivor, to have the benefit of the ſuit, ſo inſtituted by the bankrupt. The bankrupt afterwards, as was ſaid, had his certificate, and as was further ſaid, releaſed all claims, &c.

On

Hewatſon v. *Tookey.*

On the 22d of *June* 1785, the plaintiffs, the aſſignees, again applied by motion to the Maſter of the Rolls, Sir *Lloyd Kenyon* ſitting for the Lord Chancellor, that they might be at liberty to examine the ſaid other plaintiff, the late bankrupt, as a witneſs, not to prove an *exhibit*, but to the tranſaction at large. And his Honour granted the motion, ſaving juſt exceptions. It ſtriking me that though the ſaid plaintiff ſhould have releaſed, as it could not be ſaid he was diſintereſted; for ſhould the bill filed by him be diſmiſſed with coſts, he would, as he continued a plaintiff, be liable to pay ſuch coſts, as the defendants may call on which of the plaintiffs they pleaſe to pay them; and therefore it was his intereſt to ſupport the bill filed by him: for theſe reaſons I ſuſpended the order, until I had an opportunity of ſpeaking to his Honour; but his Honour being confined by illneſs in the Country, Mr. *Holliſt* moved it again this day, and in ſupport of it, cited *Troughton* v. *Getley*, by Lord *Northington* C., 12 *May* 1766 (*a*); but the Lord Chancellor reprobated that caſe, ſaid the preſent motion was againſt all rule and principle; and without hearing the other ſide denied the motion.

(*a*) ſupr. 382.

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1 Aug. 1750. Lord Hardwicke C.

Evelyn v. *Evelyn.*

Receiver of an undivided eſtate.

RECEIVER appointed of an undivided eſtate.

Earl

Earl *Plymouth* v. *Lewis*.

29 March 1749. Lib. A. 256. Lord Hardwicke C.

A MALE infant married with leave of the Court, after report of the Maſter, that it was a proper match, and that he approved the marriage articles.

The order was as follows:

"Let the report be confirmed, and let articles be entered into, in order to the carrying into execution the propoſals mentioned in the report, as far as the nature and circumſtances of the caſe will admit, with the approbation of the Maſter, and upon the execution of ſuch articles, by ſuch parties as the Maſter ſhall direct, let the plaintiff be at liberty to intermarry with the ſaid *Archer*."

The form of an order giving leave to a male infant to marry, after a reference to the Maſter, to conſider if the match propoſed were proper, and to approve of articles.

Brook v. *Brook*.

18 Dec. 1789. Lord Thurlow C.

THE like, following the order in the preceding caſe of Earl *Plymouth* v. *Lewis*.

Parſit v. *Sherſton*.

20 Jan. 1754. Lord Hardwicke C.

LEASEHOLD for lives decreed to be ſold; the infant heir to join when twenty-one, unleſs he ſhew cauſe to the contrary.

Infant heir decreed to join in ſale of leaſehold for lives, unleſs he ſhew cauſe againſt it.

Mr. Juſtice Buller ſitting for Lord Thurlow C.

Anonymous.

A client not liable to the agent employed by his ſolicitor, farther than what he may be indebted to his ſolicitor, for buſineſs done in the cauſe.

AN application having been made to Mr. Juſtice *Buller*, ſitting for Lord *Thurlow*, for an agent to deliver up papers to the party, (which had been ſent to him by the ſolicitor for the defendant), upon his being paid the whole that was due to the ſolicitor: I mentioned it to his Lordſhip, and he directed me not to deliver the order, but to tell the parties to move it again before him, which I did, and ſent him the following caſe:

Chapman v. *Clarke*, by Lord *Thurlow*, the 2d of *April* 1784. On the 10th of *January* 1784, the defendant *Clarke*, and others, petitioned, and obtained of courſe, an order, that *Mary Palmer*, the executrix of *John Palmer*, the late ſolicitor for the ſaid defendant, ſhould deliver a bill of his fees and diſburſements to be taxed, and that upon payment of what was due to him, or if already paid, to deliver books, &c.

The ſaid *John Palmer* employed one *Thomas Law*, of *Furnival's Inn*, as his agent, not only in this, but in other cauſes and buſineſs, and paid him money from time to time on account; the ſaid *John Palmer* having ſent up the ſaid defendant's papers, &c. in this cauſe to the ſaid *Thomas Law*, and being indebted to the ſaid *Thomas Law*, on a general account, *Robert Law*, the adminiſtrator of the ſaid *Thomas Law*, refuſed to deliver to the ſaid defendant the ſaid papers, &c., without being paid what the ſaid *John Palmer* was indebted to the ſaid *Thomas Law*, inſiſting he had a lien on them: The ſaid defendant being in contempt

contempt for not producing the ſaid papers before the Maſter, purſuant to the decree in the cauſe, on the 9th of *March* 1784, preſented a petition to your Lordſhip, praying, "That the ſaid *Robert Law*, the "adminiſtrator of the ſaid *Thomas Law*, might deliver "back all the books, &c. in his cuſtody or power "which had been delivered by the ſaid defendant to "the ſaid *John Palmer*, that they might produce the "ſame before the Maſter, ſubmitting to pay whatever "might happen on a taxation of his bill to be due "from them on account of their defence in this "cauſe, on having credit for the ſums paid by them "to the ſaid *John Palmer*, and that the plaintiff "might be reſtrained from proceeding againſt them "under the decree for not producing the ſame." This petition was heard the 2d of *April* 1784: Mr. *Price*, Counſel for *Robert Law*, the adminiſtrator of the ſaid *Thomas Law*, inſiſted that the papers were a pledge in his hands, and that he had a right to detain them until he was paid what was due from the ſaid *John Palmer* to the ſaid *Thomas Law*. Anonymous.

Your Lordſhip ſaid, as Lord *Macclesfield* ſaid, in *Farewell* v. *Coker*, 2 *P. Wms.* 460. and Lord *Hardwicke*, in *Grey* v. *Cockeril*, 20 *January* 1740, 2d *Atkins*, 114; (which were againſt Clerks in Court, perſons, according to the preſent conſtitution of the Court, neceſſary for the carrying on a cauſe, and to whom particular fees are due); that the defendants were ſtrangers to *Thomas Law*; that the credit given by him was to *John Palmer*, and therefore from his eſtate he muſt ſeek payment: And your Lordſhip ſaid, Suppoſe a ſolicitor's client pays money from time to time to his ſolicitor, almoſt to the amount of his bill, and thereby enables him to

Anonymous.

pay ſums to his agent on account generally; if the client were liable to the agent, he might place the money ſo paid to him to the account of thoſe he ſuſpected could not pay; and to make thoſe who were able, pay twice; it were abſurd, and unjuſt. But as this Court, in *Stevens* v. *Avery*, 1 *May* 1753; *Jeſſe* v. *Hill*, 19 *May* 1758; *Chaloner* v. *Chaloner*, 3 *April* 1759; (caſes ſubmitted to your Lordſhip); and in a like caſe in 2 *Strange*, 1126, Ex parte *Waldron*, a Clerk in the Crown Office; reſtrained the client from paying to the executor of the late ſolicitor any part of his bill for buſineſs done by the reſpective Clerks in Court in the ſaid cauſes; and as the petitioners in the caſe before your Lordſhip ſubmitted to pay what was due from them in the cauſe, having credit for what they had paid to their late ſolicitor *John Palmer*; your Lordſhip ordered the ſaid *Robert Law*, the adminiſtrator of the ſaid *Thomas Law*, to leave with the Maſter, without prejudice, the ſeveral books, &c. mentioned in the petition; and that the ſame, when left, ſhould not be delivered out without notice to the ſaid *Robert Law*; and that in proceeding under the ſaid order of the 10th of *January* laſt, the Maſter ſhould enquire whether any thing, and what, was due from the ſaid *John Palmer* deceaſed to the ſaid *Thomas Law*; and that the Maſter ſhould likewiſe take an account of what money had been paid by the ſaid *John Palmer* to the ſaid *Thomas Law*, and upon what account, with the uſual direction for taking the accounts.

It ſhould ſeem the parties compromiſed the matter, as there doth not appear that any proceedings were had under the order.

In the principal caſe, the Lord Chancellor granted the order.

Marlar

Marlar v. *Whitaker.*

1 May 1784.
Lord Thurlow C.

A bill merely to rehear and eſtabliſh wills, &c. and to execute the truſts, without praying any thing more, is not to be brought to hearing, and if brought to hearing, will be diſmiſſed with coſts. *qu.*

THE validity of a will being diſputed, the deviſee in truſt brought his bill to eſtabliſh it againſt the heir at law, and to have the truſts executed; but prayed nothing more.

On the cauſe coming on to be heard, it being ſaid that nothing more could be done than to direct an iſſue, as the heir at law diſputed the ſanity of the teſtator, the cauſe was ſcarcely opened, and the Court directed an iſſue *deviſavit vel non.*

The iſſue was tried, and there was a verdict in favour of the will.

It was ſet down, and came on this day on the equity reſerved; and all that was prayed, was, that the will might be eſtabliſhed.

The uſes having been executed, and there being no truſts for the Court to direct an execution of, the Lord Chancellor ſaid, the bringing of ſuch a cauſe to a hearing was improper; that it was merely legal; and all that was neceſſary to have been done in ſuch a caſe, was, to file a bill to perpetuate the teſtimony of the witneſſes; that ſuch bills are never brought to hearing, and if brought to hearing, are diſmiſſed; that this bill ſhould not have been brought to hearing; and therefore diſmiſſed the bill with coſts.

But this judgment was reverſed on a rehearing.

20 Dec. 1758. Lord Keeper Henly, afterwards Lord Chancellor.

Lee v. *Lee.*

The wife, by her ſettlement, entitled to ſeparate property; the huſband poſſeſſed it: She having eloped, without cauſe, and refuſing to return, the Court would not reſtrain him. Same caſe as ſupr. 321; but as it is reported more at length, it was thought proper to inſert it.

ON the marriage of the plaintiff with the defendant, the defendant covenanted that four houſes, her property, ſhould be ſettled to her ſeparate uſe; he having entered on and received the rents of thoſe houſes, ſhe filed her bill to reſtrain him from receiving the rents, and for a Receiver; and on the above day applied for an injunction; for the defendant her huſband it was alleged, and ſworn, that the plaintiff had eloped from and refuſed to return to him, although he had applied to her to return.

Lord Keeper.—Although a wife have a ſeparate eſtate, it muſt be ſuppoſed, that while they lived together in harmony, it was contributed to the ſupport of the family: the principal motive for providing a wife with a ſeparate eſtate, is to protect her againſt the debts, or miſbehaviour of her huſband; and not to put her into a ſtate of independency, which is too often the caſe: Here the wife hath thought proper to leave her huſband, without any apparent cauſe and he hath applied to her to return; which ſhe refuſes to do. Should I grant the motion, it would probably be the means of preventing her return, and therefore take nothing by the motion.

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8. *Cumulative.*

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